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Case No. _____

IN THE

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

Petitioners,

—vs—

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a prima facie case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the prima facie showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of

the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness's testimony, contrary to a well-established rule of review, deny the defendant equal protection of the law?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court which affirmed the judgment of the Ohio Court of Appeals, Eighth Appellate District. The judgment of the Ohio Supreme Court, thus, affirmed the reinstatement of the prosecution for pandering obscenity brought against petitioners by the court of appeals, following dismissal of those charges by the Municipal Court for Cleveland, Ohio.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 63 Ohio St. 2d 132. The text of that opinion is set forth in the Appendix at 1-18a. The opinion and journal entry of the Ohio Court of Appeals, Eighth Appellate District is unreported and is set forth in the Appendix at 19-35a. The opinion of the Municipal Court of Cleveland, Ohio, is

unreported and is set forth in the Appendix at 36-39a.

JURISDICTION

The judgment of the Ohio Supreme Court affirming the judgment of the court of appeals was entered on July 16, 1980.

This petition seeks review of a final judgment rendered by the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges and immunities under the Constitution of the United States are claimed to have been violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment and the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 43a. The text of the Ohio Revised Code §§2907.01 and 2907.32 are set forth in the Appendix at 44-50a.

STATEMENT OF THE CASE

On May 17, 1977, the Cleveland Municipal Court granted the motion of the defendants to dismiss the misdemeanor complaints which constituted prosecutions for pandering obscenity in violation of Section 2907.32 of the Ohio Revised Code (see Opinion of Municipal Court, Appendix at 39a). The subject of the prosecution was the publication of the widely read and nationally known and distributed (T. 90-91) magazine, Hustler. The basis for the trial court's ruling was its agreement with defendants' well-supported argument that the complaints represent selective and discriminatory prosecution and therefore, violate the equal protection provisions of the Fourteenth Amendment.

The dismissal was based upon an evidentiary hearing conducted on February 28, 1977, during which the trial judge had the opportunity to hear and weigh the testimony of Bruce A. Taylor, the assistant law director who had been in charge of the City of

Cleveland's obscenity prosecutions for two years (T. 8-9), and of Steven Nemeckay, a member of the Cleveland Police Department's Bureau of Inspection, Special Investigations Unit, obscenity detail (T. 136-137).

Assistant Law Director Taylor[1/] testified that since the Mayor's police unit on obscenity was formed in April of 1973, the City had initiated between 500 and 550 obscenity prosecutions (T. 9-10). Materials were selected for prosecution largely upon the instructions given to the police by witness Taylor in his capacity as prosecutor of these cases (T. 14). His general instructions to the police were that applicable Supreme Court decisions prohibited the sale of "obscenity which is hardcore." (T. 14). He "defined to them what [he] though hardcore meant." (Ibid.) This definition

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1/ This witness had been directly involved in obscenity prosecutions for the City over four years, first as a law student, then as an assistant prosecutor, and finally, as an assistant law director (T. 8-9).

referred to "actual instead of simulated acts of sex, and where ejaculation et cetera, is shown...." (Ibid.) Accordingly, enforcement concentrated on "what we call adult bookstores and theaters" where such materials are purchased (Ibid.).

At the direction of Assistant Law Director Taylor, the police were to seize the "most explicit of the material available." (T. 16). Explicit meant "actual photographs of penetration where it is clearly shown and not just in position" (ibid.) or bizarre depictions of "bestiality, masochism, bondage and sado-masochism" (T. 17), all of which had "sexual conduct clearly shown." (Ibid.) His instructions were carried out by the police (T. 16).

During the two years of witness Taylor's tenure as supervisor of obscenity prosecutions, there had been no actions initiated against paperback books or unillustrated materials (T. 19-20). Consistent with his guidelines, virtually all prosecutions

involved works displaying explicit sexual activity (T. 30, 31). In the judgment of the prosecutor and the police, all the prosecuted materials were devoid of any serious or redeeming commentary (T. 24-25, 36). Moreover practically every publication[2/] contained more than mere frontal nudity. In a startling admission, witness Taylor acknowledged "[w]e had never prosecuted a magazine like Hustler" (T. 86).

The proof at the hearing[3/] demonstrated that Hustler follows the format and basic philosophy of a number[4/] of nationally known

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2/ Except a magazine containing nude photographs of children (T. 31), and a vague allusion to a newspaper format publication called "Screw" which the witness could not recall showing actual penetration (T. 47).

3/ The July and August 1976 issues which were the subject of the prosecution were identified before the court during the hearing, and the witness testified as to what he could see in the magazine (T. 57, et seq.); however, at the prosecutor's request, they were not marked as exhibits.

4/ Perhaps as many as 50 or 75 (T. 93-94).

men's or adult magazines sold in the Cleveland community, such as Playboy, Club, Penthouse, Gallery, Genesis, Oui, Cavalier, Swank, Stud and Dude (T. 88-89, 90-91, 93, 122). Hustler contains editorials, motion picture reviews, feature articles, contemporary fiction, interviews and special commentaries dealing with various sexual subjects. The magazine publishes pictures of women in the nude with the genitals fully exposed but, as testified to by witness Taylor, there are no pictures of explicit sex acts so as to bring Hustler squarely within the policy of Taylor's office. (T. 58-59).

Witness Taylor testified at some length concerning the content of the July issue of Hustler (T. 57-88), and concurred that the August issue was similar (T. 102). He admitted telling a television interviewer that the prosecution was launched because of a political cartoon (T. 54) which was the subject of complaints to the police (T. 54-55). In apparent contradiction, he denied that

the defendants were charged because of that cartoon, but admitted that he had publicly indicated the cartoon was a reason the magazine had been singled out for prosecution (T. 55). Taylor urged that a depiction of Uncle Sam with his pants down also contributed to the decision to prosecute, but confessed that his basis for this judgment was merely the nudity in the cartoon (T. 66).

As described by witness Taylor, the July issue of Hustler contained many features, cartoons, pictures and stories which of themselves were not obscene (T. 69-70, 73, 75, 76). However, he pointed to "dirty jokes" (T. 78), pictures of dolls in relation to sexual activities (T. 80), a cartoon showing simulated sexual intercourse (T. 82), and exhibitions of genitals (T. 83) as supporting his conclusion that the magazine, taken as a whole, was obscene (T. 82). Nevertheless, in a display of candor, Taylor testified that he had never prosected magazines devoted solely to frontal nudity (T. 84, 87), solely

to stories dealing with sex (T. 87), solely to cartoons (T. 87-88), or solely with reviews of X-rated materials (T. 88).

When questioned on the comparisons between Hustler and the other national men's magazines widely sold throughout the area, witness Taylor agreed that the others, like Hustler, contained pictures of nude women with exposed genitals (T. 95), stories dealing with sex (ibid.), and "advise and consent" columns answering reader's questions about sexual problems (ibid.). He concurred that Hustler followed the format of these other magazines (ibid.) and that some of the others such as Club and Gallery show scenes of simulated sexual intercourse (T. 95-96).

The testimony further established that articles on the various sexual aberrations mentioned in Hustler also appeared in these other magazines (T. 36). He conceded that, excluding Playboy, the other magazines were "comparable to Hustler," and that the pictures were "pretty much the same" (T. 98);

that, in fact, at least Club's pictures were "stronger." (Ibid.)

Turning to the differences between Hustler and the other magazines, witness Taylor opined that the stories in Penthouse "seem to be a little better written as far as literary words" (T. 99). However, when asked whether there were differences in content he acknowledged that they "still describe the same thing...." (Ibid.)

In sum, witness Taylor's differentiation between Hustler and the other nationally distributed men's magazines merely rested on his opinion that Hustler's jokes were more shocking (T. 98), its stories less well written (T. 99) and of "lower mentality" (T. 99), and its cartoons[5/] more sexually

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5/ Witness Taylor did not know whether the cartoons in Hustler were "more tasteless" than those of various other men's magazines (T. 100). He felt that the "Happy Hooker" series in Hustler, though similar in length to Playboy's "Annie Fannie" and Penthouse's "Wicked Wanda", showed more sex than the others (ibid.).

oriented (T. 101).

Prior to the hearing (T. 105), the City of Cleveland had not only commenced the instant prosecution against Hustler, it had also brought a civil injunction suit against the magazine in the Cuyahoga County Common Pleas Court.[6/] Taylor's office expressly threatened sellers of the magazine that if Hustler were deemed obscene, its sale would be a violation of law (T. 166-167). A letter was sent by the prosecutor's office to the George Klein News Co., distributor of Hustler, advising of the City's intention to prosecute the dissemination of the magazine (T. 103-105).

The singular most important fact to come out of the February 28 hearing was that Assistant Law Director Taylor had never initiated either criminal (T. 108) or civil (T. 104) proceedings against any of the other men's magazines. The record established that

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[6/] No. 959,230 on the civil docket.

the police and the prosecutor's office knew of and actually examined other magazines (T. 106), but did not open any files on them (T. 107), or take any steps toward prosecution of them (T. 106). There were no seizures of other magazines (T. 108), and Officer Nemeckay conceded that he had not even started steps preliminary to such action (T. 167-168). No mention of other magazines was made in the prosecutor's communications with the George Klein News Co. (T. 104).

The Assistant Law Director confessed that "public reaction" and "what the community feels about what we're doing" were factors in his decision of whether to prosecute Hustler or other magazines (T. 115-119). However, he feebly attempted to explain away these remarks by stating that publicity causes the cases to be more "drawn out" (T. 118).

The trial court, after weighing all of the evidence, including the credibility of the witnesses, found that:

(1) Cleveland's obscenity prosecutions were based on guidelines limited to hard core pornography (Opinion of Municipal Court, Appendix at 37a);

(2) The magazines prosecuted to date were sold only in "adult" book stores (ibid.);

(3) Other magazines generally available throughout the community contained some hard core material and were not prosecuted (ibid.);

(4) Hustler did not contain hard core material (ibid.);

(5) Other magazines similar to Hustler were actually available at the same locations and were not being prosecuted (ibid.).

The trial court did not attach significance to the fact that this was the "first prosecution of this type of magazine or of this type of defendants" (Opinion of Municipal Court, Appendix at 38a). However, the Court specifically noted that "no other similar prosecutions had been initiated either prior or subsequent to the charges filed in this case in July of 1976." The Judge was speaking as of May 17, 1977. The Court stated that:

> "[i]f there are, as the evidence clearly indicates, other magazines, similar in content to the magazines in question, then to select and prosecute this magazine only presents a serious constitutional question."

The charges were dismissed on the trial judge's finding that the testimony supported defendants' allegations of discriminatory prosecution.

However, the court of appeals, after reviewing the cold record without the opportunity of assessing the credibility of the witnesses, determined that there had not been a showing of unlawful discriminatory prosecution. Despite the prosecutor's admission that an immodest political cartoon was the reason Hustler magazine had been singled out for prosecution (T. 54), the court of appeals chose to believe the prosecutor's subsequent apology that the prosecution was a test case and to override the court below. Despite Assistant Law Director Taylor's admissions that he had handled all obscenity prosecution for the City for the past two years (T. 8),

that during that time the Chief Prosecutor had left decisions on whether to prosecute to Taylor's discretion (T. 19) and that Taylor had made the decision to prosecute Hustler, the Court of Appeals held that the petitioners should have "presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format [as Hustler]." (Opinion of Court of Appeals, Appendix at 31a), because Taylor had claimed, contrary to his earlier assertions of authority, that he couldn't make the decision on whether to prosecute other magazines similar to Hustler (Opinion of Court of Appeals, Appendix at 30-31a). Because the defendants failed to present plenary proof that other magazine publishers wouldn't be prosecuted, the court of appeals held that defendants failed to meet their heavy burden of proof, rather than shifting the burden to the prosecution to rebut the defendant's case.

On appeal to the Ohio Supreme Court, petitioners urged that after having presented a prima facie case of discriminatory prosecution, the burden should have shifted to the prosecution to rebut that showing (Appendix at 51a). However, the Ohio Supreme Court affirmed the judgment of the court of appeals and held that:

> "In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions." 63 Ohio St. 2d at 136, Appendix at 9a.

In a strong dissent, Justice Paul W. Brown urged that the defendants had sustained their burden of proof (63 Ohio St. 2d at 136, Appendix 10a) and that the majority had selectively adopted testimony to support the prosecutor's "test case" argument (63 Ohio St. 2d at 137, Appendix 13a). Justice Brown pointed out that Taylor's denial of authority to pursue other prosecutions was contradicted by Taylor's claim that he "possessed the exclusive delegated authority to select which

cases to prosecute and that he alone had made the decision to pursue Hustler" (63 Ohio St. 2d at 137, Appendix at 12a).

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION FOR REVIEW, NOT PREVIOUSLY DECIDED BY THIS COURT, IS PRESENTED BY THIS CASE CONCERNING WHETHER IN A CRIMINAL PROSECUTION FOR THE DISTRIBUTION OF MATERIALS WHICH ARE ARGUABLY PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, WHERE THE DEFENDANT HAS PRESENTED A PRIMA FACIE CASE OF UNCONSTITUTIONAL DISCRIMINATORY PROSECUTION, THE STATE THEN HAS THE BURDEN OF REBUTTING THE PRIMA FACIE SHOWING TO AVOID A FINDING OF DISCRIMINATORY PROSECUTION.

This Court has long recognized that discriminatory enforcement of criminal laws constitutes a denial of equal protection of the law, Yick Wo v. Hopkins, 118 U.S. 356 (1886), Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). However, in order for selective enforcement of the law to be construed as an unconstitutional discrimination, the discrimination must be "intentional or purposeful," Snowden v.

Hughes, 321 U.S. 1 (1944).

In this case, in reversing the trial court's finding of discriminatory prosecution, the Ohio Supreme Court reasoned that the defendant had failed to sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution because they failed to present evidence that Hustler alone would be prosecuted.

However, it is clear that although a defendant is required to show "purposeful" discrimination to gain relief, malice, in the sense of personal ill-will toward the victim of discrimination, need not be demonstrated. See, Givelber, The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law, 1973 U. Ill. L. Forum 88, 90-96. Discriminatory selection of subjects for prosecution has been equated with prosecution "based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." United States v. Berrios,

501 F.2d 1207, 1211 (2d Cir. 1974).

Moreover, federal appellate courts have recognized that discriminatory enforcement of laws in a manner which curtails First Amendment freedoms is especially pernicious:

> "[T]he Supreme Court has stated, 'It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups whether by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibiting statute.'" United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972) (Underscoring added).

See extensive discussion in United States v. Falk, 479 F.2d 616, 622-624 (7th Cir. 1973). See also, United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

Even though the final burden of persuasion concerning discriminatory enforcement lies with the defendant, recent authority holds that a mere threshhold showing of

discrimination by the defense shifts the burden of going forward to the prosecution. See, e.g., United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steele, 461 F.2d 1448 (9th Cir. 1972). The necessity for this approach was suggested in Givelber, The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law, 1973 U. Ill. L. Forum 88, where the author states that:

> "Rather than requiring a defendant to prove the prosecutor's knowledge and motivation in order to establish a denial of equal protection, a court should hold that the burden of going forward shifts to the state once the defendant proves that only a few of the knowable violators of a law have been prosecuted or that the group prosecuted for violating a law differs from the group not prosecuted in characteristics irrelevant to law enforcement purposes. Only after the state explains what has produced the unequal treatment can the court determine whether the selective enforcement results from the application of unjustifiable or arbitrary enforcement criteria." Id., at 106.

Upon similar reasoning, it has been held that "the government, being in possession of the facts...should have come forward with evidence, if it could, to rebut the inference of a double standard." United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). In review of the City of Cleveland's established previous policy of not prosecuting the magazines similar to Hustler, the observations of the court in United States v. Falk, 479 F.2d 616 (7th Cir. 1973), are particularly relevant:

> "It is, of course, possible that ...the government changes its policy on nonprosecution. However, in view of its admitted policy not to prosecute prior to that decision we believe that in the particular circumstances of the instant case it was incumbent upon the government to come forward with the evidence that it had in fact changed its policy generally or otherwise to explain why Falk was being singled out for prosecution in contravention of the government's own procedures." Id., at 621 (Underscoring added).

The record in this case underscores the difficulty defendants face in proving

unconstitutional discriminatory enforcement of the law. Further, the decisions of the courts below demonstrate the uncertainty and confusion which surrounds the issue of allocating the burden of proof and the burden of presenting evidence in a case where the defense of discriminatory enforcement has been raised.

The record in this case clearly established a more than sufficient basis for an inference of unjustifiable discrimination adequate to shift the burden to the prosecution. The sexual content of Hustler was no more explicit than that of the other magazines of its genre, milder than at least one of the others and Hustler contained articles and features which were not even sexually oriented (see pp. 8-9, supra). Through the testimony, Hustler emerges as a magazine that takes an irreverent attitude toward institutions of government, including national political figures (T. 48), the Statute of Liberty (ibid.), and a prosecutor (T. 65). The prosecution

was admittedly commenced as a result of an irreverent political cartoon (T. 54) and witness Taylor testified that "publicity" and "public reaction" played a part in the process of selection (T. 116-119). Under the circumstances of this case, where First Amendment rights arguably were at stake, and where ample evidence had been presented to raise the inference of discriminatory prosecution, the burden should have shifted to the prosecution to rebut the defendants' evidence, rather than placing the virtually impossible burden upon the defendants to prove through other government officials that Hustler alone would be prosecuted.

Defendants had presented evidence through the Assistant Law Director's testimony that he alone had determined to prosecute Hustler and that he had been delegated the authority to determine what prosecutions to commence during the prior two years. The fact that the witness later urged that other officials would have to make the decision to prosecute

other magazines like Hustler should not alone have defeated the defendants' showing of discriminatory enforcement.

A case such as this, where First Amendment freedoms arguably are at issue, demonstrates the need for guidance from this Court on a question which has been confronted by federal and state courts with greatly different results. Because of the important First and Fourteenth Amendment rights at issue in this case and because resolution of the question presented would be of great benefit to the administration of criminal justice, this Court should accept review of this case.

AN IMPORTANT QUESTION CONCERNING EQUAL PROTECTION OF THE LAW IS PRESENTED WHERE A TRIAL COURT, AFTER WEIGHING THE EVIDENCE PRESENTED, INCLUDING THE CREDIBILITY OF THE WITNESSES, FINDS THAT DISCRIMINATORY ENFORCEMENT HAS BEEN PROVEN, BUT AN APPELLATE COURT REVERSES THAT FINDING BECAUSE OF THE APPELLATE COURT'S REFUSAL TO ACCEPT THE TRIAL COURT'S DETERMINATION OF CREDIBILITY, CONTRARY TO A WELL-SETTLED RULE OF REVIEW.

The appellate courts below held that the

defendants failed to sustain their burden of proof as to the intent to discriminate against Hustler magazine because they failed to present evidence that Hustler alone would be prosecuted. In reaching this conclusion, the appellate courts ignored an equally well-settled principle that a trier-of-facts' determination of the credibility of a witness is entitled to great weight on appellate review. Landis v. Kelly, 27 Ohio St. 567, 571-572 (1875).

In the instant case, the only evidence offered by the defendants or the state was the testimony of witnesses Taylor and Nemeckay. The trial court, sitting as trier-of-fact, was able to observe the reactions of the witnesses while they were questioned and to hear the inflection and emphasis given to words and phrases by the witnesses. Because the two witnesses were the very persons who were closely involved in prosecuting Hustler, they could not be expected to offer direct admissions of discriminatory prosecution.

The credibility of their answers was directly at issue. Therefore, the trial court's task was especially demanding and its acceptance and rejection of the witnesses' answers on the basis of credibility should have been accepted on appellate review. As the trier of fact, the trial judge was obliged to determine whether the motive of the prosecutor was unfairly to single out Hustler for a discriminatory purpose; and since there is ample evidence to support that conclusion, the judgment of the trial court should not have been reversed. Indeed, Justice Brown, in his dissent from the decision of the Ohio Supreme Court, sharply criticized the court for selective adoption of testimony.

In a case in which discriminatory enforcement against controversial public figures has been alleged and found to exist, an appellate court's refusal to accept the trial court's determination of credibility of testimony of a witness violates the defendants' rights to equal protection of the law where

the rule of deference to determinations of credibility has been followed in other less notorious cases.

Because of the importance of the question presented herein, this Court should accept review of this case.

CONCLUSION

This case clearly presents a question of great importance to the administration of criminal justice. Not only is a citizen's Fourteenth Amendment right to be free from discriminatory enforcement of the law at issue in this case but also the rights to untrammeled expression of thoughts and opinions, particularly political opinions, guaranteed by the First Amendment to the United States Constitution, are presented.

In this case, a nationally known and distributed men's magazine was singled out for prosecution under Ohio's obscenity statutes because the magazine promoted its political opinions in a manner which offended

an assistant law director of the City of Cleveland and a few other members of the community. The trial court below, after listening carefully to the testimony which was presented, reasonably concluded that there was discriminatory enforcement of the Ohio obscenity laws in violation of the defendants' constitutional rights to equal protection and free speech. However, on review, the appellate courts in a case where unconstitutional restraint of free speech was presented, placed the impossible burden upon the defendants of presenting plenary proof of the City's policy concerning prosecution of men's magazines, rather than properly shifting the burden to the prosecution to rebut what was rtainly a prima facie showing of discriminary enforcement.

In sum, what hangs in the balance is a citizen's ability to vindicate his right to free expression where a discriminatory prosecution has been brought in an attempt to silence him. Therefore, this Court should

accept this case for review to clarify the procedure to be employed where a defense of discriminatory enforcement has been made. Upon review, this Court should reverse the judgment of the Ohio Supreme Court and affirm the judgment of the Cleveland Municipal Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE OHIO SUPREME COURT

THE STATE OF OHIO, APPELLEE,
v. FLYNT ET AL., APPELLANTS.

(No. 79-556--Decided July 16, 1980.)

APPEAL from the Court of Appeals for Cuyahoga County.

On July 14, 1976, complaints were issued against defendants-appellants, Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, for allegedly pandering obscenity in violation of R. C. 2907.32(A)(2), complicity in violation of R. C. 2923.03(A)(2) and personal accountability for organizational conduct in violation of R. C. 2901.24(A)(1). The complaints alleged that the defendants, as officers, agents or employees of Hustler magazine, caused, or permitted, the exhibition or dissemination of materials known to be obscene, to wit, the July and August, 1976, issues of Hustler magazine.

The defendants moved to dismiss the complaints on the basis that they were discriminately prosecuted, in contravention of the Equal Protection Clause of the Fourteenth Amendment. The trial court granted an

evidentiary hearing on the motion, whereupon the following facts were elicited, primarily from Bruce A. Taylor, the assistant law director for the city of Cleveland. Taylor had been in charge of the city's obscenity prosecution when these complaints were issued.

It was testified that since Spring of 1973 the city of Cleveland had initiated between 500 and 550 obscenity prosecutions. The materials selected for prosecution were largely determined in accordance with instructions given by Taylor to police officers, although the officers were given considerable latitude to exercise their own discretion. The instructions provided that applicable Supreme Court decisions proscribed the sale of "obscenity which is hard-core." "Hard-core" was understood to encompass "actually instead of simulated acts of sex." The officers were further instructed to seize the "most explicit of the material available." Enforcement therefore concentrated on "adult

book-stores and theaters." There was also testimony that certain materials which may not have contained "actual sexual contact" were, nevertheless, seized and prosecuted. It was conceded by Taylor, that "[w]e nad never prosecuted a magazine like Hustler."

Further testimony revealed that the police department received complaints about the July 1976 issue of Hustler, and, in particular, a cartoon depicting sexual activity between prominent political figures and the Statute of Liberty. An investigation ensued, whereupon a copy of the issue was brought to Taylor, who subsequently decided to initiate action against the magazine.

Taylor asserted that Hustler was prosecuted as a test case. Other magazines of a similar nature had been under investigation for eight months without being prosecuted. He conceded that such an extended investigation was unusual. When questioned why he did not prosecute these magazines, Taylor stated that he was "waiting for this case."

When he was asked whether further prosecutions would follow, should he receive a favorable decision in this case, Taylor responded, "I don't know. That decision I can't make alone either" but "[i]t's being discussed."

On the basis of this testimony and the testimony of a Cleveland police officer working obscenity cases, the trial judge determined that the defendants were prosecuted discriminatorily, in violation of the Fourteenth Amendment, and dismissed the complaints. The Court of Appeals reversed, holding that the defendants failed to sustain their burden of proof.

The cause is now before this court upon the allowance of appellants' motion to certify the record.

Ms. Almeta Johnson, chief police prosecutor, and Mr. Bruce A. Taylor, for appellee.

Messrs. Berkman, Gordon, Kancelbaum, Levy & Murray, Mr. Bernard A. Berkman, Mr. George W. Palda, Mr. Herald Price Fahringer and Mr. Paul J. Cambria, Jr., for

appellants.

Per Curiam. The law is well settled that the government is subject to constitutional restraints in its choice of those whom it may prosecute. As long ago as Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-74, the United States Supreme Court stated that although a "law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," there is a denial of equal protection of the laws.

The conscious exercise of some selectivity in enforcement is not in itself, however, a violation of the United States Constitution. Oyler v. Boles (1962), 368 U.S. 448, 456. In order for selective enforcement to reach the level of unconstitutional discrimination the discrimination must be

"intentional or purposeful." Snowden v. Hughes (1944), 321 U.S. 1, 8. This concept of "intentional or purposeful discrimination" was explained in United States v. Berrios (C.A. 2, 1974), 501 F.2d 1207, 1211, as follows:

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at lease prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'" This test has been recognized by numerous

courts. See United States v. Murdock (C.A. 5, 1977), 548 F.2d 599, 600; United States v. Ojala (C.A. 8, 1976), 544 F.2d 940, 943; United States v. Legget & Platt, Inc. (C.A. 6, 1976), 542 F. 2d 655, 658, certiorari denied, 420 U.S. 945 (1977); United States v. Bourque (C.A. 1, 1976), 541 F. 2d 290, 292-293; United States v. Peskin (C.A. 7, 1975), 527 F. 2d 71, 86, certiorari denied, 429 U.S. 818 (1976); United States v. Scott (C.A. 9, 1975), 521 F. 2d 1188, 1195, certiorari denied, 424 U.S. 955 (1976).

Applying these principles to the instant cause it must be conceded that defendants demonstrated that other magazines with a format similar to Hustler, sold in the same stores as that magazine, were not yet being prosecuted, although the authorities were aware of their existence and general content. There are, however, several legitimate reasons testified to at trial as to why Hustler

magazine was chosen as a test case.[1] The prosecutor, for example, testified that while it contained a similar format as other magazines on the market, that some portions of Hustler were more offensive than those in the compared magazines. It was also testified that the prosecution of out-of-state magazines would entail greater difficulties in service of process and extradition. The officers of Hustler, on the other hand, were

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1 The validity of pursuing a test case and its relationship to the doctrine of discriminatory prosecution was explored in the case of People v. Utica Daw's Drug Co. (1962), 16 A. D. 2d 12, 225 N.Y. Supp. 2d 128, 136, where it was stated:

"Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found."

domiciled in Ohio.

In addition, the defendants did not establish that Hustler alone would be prosecuted. The prosecutor in this case stated that he did not have the authority to make the decision concerning subsequent prosecutions of other magazines. Testimony from his superiors was necessary to infer that the city of Cleveland would not follow up a successful result in the instant cause with the bringing of additional prosecutions.

The burden on a defendant to show intentional or purposeful discrimination is a heavy one, Berrios, supra, and will not be presumed, Snowden, supra. We hold that the defendants herein did not sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution. In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions.

Accordingly, the judgment of the Court

of Appeals is affirmed.[2]

Judgment affirmed.

CELEBREZZE, C. J., HERBERT, W. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

PAUL W. BROWN, J., dissenting. I agree with the test used by the majority and I also agree that there is a heavy burden upon the defendants to demonstrate intentional or purposeful discrimination. I would hold, however, that the defendants sustained this burden and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.

It is well-settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in

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Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper determination of the credibility of the witnesses at trial.

every reasonable presumption in favor of findings made by the court below as a basis for its decision. Beach v. Sweeney (1958), 167 Ohio St. 477. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See Brescoll v. Nationwide Mut. Ins. Co. (1961), 116 Ohio App. 537, 543; Thayer v. Shorey (1934), 287 Mass. 76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle.

Applying the test used by the majority, governing discriminatory prosecutions, quoted from United States v. Berrios (C.A. 2, 1974), 501 F. 2d 1207, 1211, it is apparent that the first prong of that test is met. The defendants presented evidence, the witness Taylor conceded, and the trial court found,[3]

[3] There are no findings of fact or conclusions of law in the record. There is, however, a document entitled "Memorandum to Attorneys," authorized by the trial judge, indicating some of the factual considerations supporting his decision. Any reference to the trial court's "findings" are derived from this document.

that the city of Cleveland had never before prosecuted a magazine like Hustler, despite the fact that magazines similar to or pictorially "stronger" than Hustler were available within the community. Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. Lengthy investigations of similar magazines were dropped without taking even preliminary steps toward prosecution. Taylor's attempted justification, i.e., that he was awaiting the outcome of this case, was contradicted by his subsequent testimony concerning the likelihood of general enforcement in the future if he received a favorable judgment in the case. When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors--this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler.

Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons.

In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, improperly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present.

As to the second prong of the Berrios test, i.e., that the discriminatory selection is invidious or in bad faith if based upon impermissible considerations, substantial evidence was presented to establish that the

prosecution was initiated (1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights. Either motivation, standing alone, would be a sufficient basis for a finding of invidious selection or bad faith.

Taylor explained that he would need to consult his superiors concerning future prosecutions of magazines similar to Hustler because of publicity surrounding obscenity prosecutions. Taylor stated that public reaction was a legitimate consideration in obscenity cases because strong public interest impeded the speedy disposition of these cases and because public response was a barometer of the community's perception of obscenity. The trial court properly took exception to these proffered justifications as a basis for selecting cases to prosecute. The judge noted that the progress of a trial is not a function of attendant publicity, nor should public reaction be used as an index to the community's ideas as to what constitutes

obscenity; such a determination being within the domain of a jury. A reasonable inference to be drawn from this testimony, and one which the trial court apparently drew,[4] is that the defendants were prosecuted on the basis of unfavorable public sentiment. Upon this evidence the trial court could reasonably have found that this prosecution was initiated in "bad faith," i.e., that it was grounded upon an arbitrary standard to pursue only those whom the public held in disfavor. As the court noted in United States v. Torquato (C.A. 3, 1979), 602 F. 2d 564, 568:

"***To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting

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The court asked witness Taylor:

"Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute, or the city of Cleveland, that you first determine what the public feels about it before you proceed***?"

the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias." It is our obligation to prevent such personal abuses of governmental power.

There are also indications that the prosecution was brogh to chill the defendants' First Amendment rights. There was strong evidence that the prosecution was initiated on the basis of the political cartoon depicting sexual activity between political figures and the Statute of Liberty (as well as the cartoon displaying Uncle Sam with his pants down). This was admitted during the course of a television interview and at the hearing, although Taylor subsequently attempted to retract and qualify these statements. Taylor conceded that the cartoon was "the most protected thing in the whole magazine." He could hardly argue otherwise, in light of Papish v. Univ. of Missouri Curators (1973), 410 U.S. 667, wherein the

United States Supreme Court held that a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice was not constitutionally obscene. This testimony alone served as an independent basis for the trial court to find bad faith through the inhibition of First Amendment rights.

I conclude that having made a proper showing of discriminatory prosecution, the defendants are entitled to discharge. Such a determination in no way reflects upon the guilt or innocence of the defendants.[5] If,

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5 "The question is***whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single class of defendants for prosecution because of personal animosity or some other illegitimate reason. The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a generally disregarded law is to place in the hands of the police and the prosecutor a power of the type frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies. The court is asked to stop the prosecution at the threshold, not because

and when, the public authorities decided to undertake a generalized enforcement of the law, the defendants could again be charged.

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the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant." People v. Utica Daw's Drug Co. (1962), 16 A.D. 2d 12, 21, 225 N.Y. Supp. 2d 128, 133.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 38079

STATE OF OHIO

APPELLANT

-vs-

LARRY C. FLYNT,
ET AL.

APPELLEES

APPEAL FROM

CLEVELAND MUNICIPAL COURT

No. 76 CRB 16688,
16687 & 16689

JOURNAL ENTRY
AND OPINION

DATE FEB 8 1979

KRENZLER, P.J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done by the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On July 14, 1976, complaints were issued against the defendant-appellees Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure in the Cleveland Municipal Court, alleging violations of R.C. 2907.32(A)(2) governing the pandering of obscenity.[1] The complaints alleged that the appellees were officers, agents, or employees of Hustler Magazine. The offenses charged were based upon the July and August, 1976 issues of that publication.

The appellees moved to dismiss the complaints upon the ground of discriminatory prosecution. Although a copy of the motion is not contained in the record before this court on appeal, a hearing on the motion was

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1 R.C. 2907.32(A) provides in part:

"No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material...."

held by the trial court on February 28, 1977. On May 17, 1977, the appellees' motion to dismiss was granted, and the appellees were ordered discharged.

The appellant, State of Ohio, is appealing from the trial court's decision granting the appellees' motion, and assigns the following error:

> THE SELECTION OF "HUSTLER" MAGAZINE FOR OBSCENITY PROSECUTION IS NOT AN EXERCISE OF UNCONSTITUTIONAL DISCRIMINATION.

At the hearing below, the principal witness for the appellees was Bruce A. Taylor, Assistant Director of Law with the City of Cleveland and the prosecutor assigned to prosecute obscenity cases. Mr. Taylor testified that he had been on this assignemnt for two years, ever since becoming an attorney. Since 1973 there had been approximately 500-550 obscenity arrests in Cleveland, and of this total, one-half to two-thirds involved films and the remainder involved magazines.

Mr. Taylor stated that written guidelines had been developed for the police

department three to four years earlier to guide them in making arrests for obscenity. He testified that he had never relied on these guidelines, and that police officers were concentrating on "mostly hard-core meaning actually [sic] instead of simulated acts of sex, and where ejaculation, et cetera, is shown." (Tr. 14). He did not know whether the written guidelines on obscenity arrests were still controlling, and testified that he had never seen them. He had instructed police to concentrate on "more explicit" as opposed to "less explicit" materials.

To Mr. Taylor's knowledge, there had been no prosecutions of publications involving only written material. To his knowledge there had been only two prosecutions involving materials, such as Hustler, not depicting explicit sexual activity.

Regarding the prosecution of Hustler, Mr. Taylor testified that a copy of the July issue of that magazine had been sent to the Cleveland Police Department, and that several

complaints were made regarding a cartoon depicting prominent political figures engaged in sexual activity with the Statute of Liberty. The police officers brought the magazine to Mr. Taylor, who examined its overall content. He stated that while the cartoon was "one of the reasons they were prosecuted" it was not "one of the reasons they were charged." He also stated that in his opinion the magazines were legally obscene.

He also stated that the city had never prosecuted a magazine like Hustler, and that this was the first prosecution of a magazine having a second-class mailing privilege and nationwide distribution. A number of "men's magazines" had been under investigation for eight months, but no prosecutions had been initiated.

At this point in the hearing, the following dialogue took place:

> Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience

here as a prosecutor?

A. Well, it's unusual -- this is the first time it has happened because we're waiting for this case.

Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud --

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed. (Tr. 92)

Mr. Taylor stated that the other men's magazines referred to by appellees' counsel were comparable to Hustler.

Officer Steven Nemeckay of the Cleveland Police Department Obscenity Detail testified that he had purchased the two issues of Hustler upon which the prosecution was based at the instruction of Mr. Taylor. The issues were taken to several judges, and their determination regarding its contents led to the filing of the complaints.

Subsequently, the order of dismissal based on discriminatory prosecution was entered, and the state brought this appeal.

The question presented by this appeal is whether the appellees made a proper showing of discriminatory prosecution so as to entitle them to discharge.

It is well settled that upon a proper showing of discriminatory prosecution a criminal defendant is entitled to discharge. The principle of law underlying such a discharge is that although a statute or ordinance may be fair and impartial on its face, the equal protection clause of the Fourteenth Amendment prohibits the application and administration of such laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-74. In Yick Wo v. Hopkins, supra, the Supreme Court overturned the petitioners' convictions on the ground that

the prosecutions against them were based solely on their race and nationality.

Where a claim of discriminatory prosecution is considered, the standard to be followed is whether the selection of the defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles (1962), 368 U.S. 448; State v. Wolery (1976), 46 Ohio St. 2d 316, cert. denied 429 U.S. 932. See also State v. Steurer (1973), 37 Ohio App. 2d 51; Annot., 4 A.L.R. 3d 404.

In a leading case in this area of the law, it was stated that the question to be answered is "whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason. The wrong to be

prevented is a wrong by the public authorities." People v. Utica Daw's Drug Co. (1962), 16 App. Div. 2d 12, 17-18.

While the doctrine of discriminatory prosecution is well established, it should not be equated with mere selectivity in prosecution, without a concomitant showing of deliberate discrimiantion based on an unjustifiable standard. Taken alone, the conscious exercise of some selectivity in enforcement is not a federal constitutional violation. Oyler v. Boles, supra at 456. See State v. Wolery, supra. Accordingly, the Ohio Supreme Court has noted the "discretion vested in a public prosecutor to exercise selectivity in the enforcement of criminal statutes." State v. Wolery, supra at 325. The burden of proving conscious, intentional discrimination is upon the defendant and is a heavy one. People v. Utica Daw's Drug Co., supra at 19.

The bounds of prosecutorial discretion to selectively prosecute offenders was

examined at some length in People v. Utica Daw's Drug Co., supra. In that case, the court pointed out that such selectivity may be justified where "the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity." Id. at 21. Such a method of prosecution "may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary." Id. It is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present. Nevertheless, "[i]t is only when the selective inforcement is designed to discriminate against the persons prosecuted, without any

intention to follow it up by general enforcement against others, that a constitutional violation may be found." Id.

Applying the above principles to the instant case, it is clear that the appellees demonstrated that other "men's magazines" with a format similar to Hustler were not yet being prosecuted. It was also shown that such magazines were being sold in the same sort of stores as Hustler, and that the authorities were aware of their existence and general content.

At the same time, the prosecutor who testified at trial stated that the prosecution of Hustler was a test case. Although the magazine was brought to the attention of public authorities in part because of an offensive cartoon, the prosecutor provided several reasons why Hustler was chosen for a test case. First, he maintained that while it contained essentially the same format as other magazines, some portions were more offensive than those in similar magainzes.

Second, he stated that to his knowledge, prosecution of officers of out-of-state magazines would at the least entail greater difficulties of service of process and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

Also, taking the testimony from the hearing below in context, the testimony of Mr. Taylor, an assistant Director of Law, was not sufficient to meet the appellees' burden of proof as to intentional discrimination. In particular, he stated that he was not in a position to make the decision of whether the other "men's magazines" under investigation would be prosecuted if the Hustler prosecution were successful:

> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud --
>
> A. I don't know. That decision, I can't make alone either. (Tr. 92)

If Mr. Taylor had stated that he was in

a position to decide whether to prosecute the other publications, his testimony that they had not yet been prosecuted would perhaps be some evidence of discriminatory intent. Absent testimony from his superiors, however, there was no reliable basis upon which the trial court could infer that the City of Cleveland would not follow up a successful result in the Hustler case with additional prosecutions. Taking the testimony of Mr. Taylor alone, on the other hand, the court had before it no substantial evidence to support a conclusion that Hustler alone would be prosecuted, much less that this selectivity was based on constitutionally prohibited discrimination. Accordingly, in order to sustain their burden, the appellees should have at least presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format. Such testimony might have provided a reliable basis for a conclusion that discriminatory intent was

indeed present. Absent such testimony, we must conclude that the appellees did not present evidence of such quality to sustain their burden of proof as to the intent underlying the decision to prosecute Hustler.

Our conclusion should be viewed in light of the fact that the burden of proving conscious discriminatory intent is upon the defendant and is a heavy one. People v. Utica Daw's Drug Co., supra. Also, as discussed earlier, selectivity in prosecution alone is not sufficient to demonstrate a constitutional violation absent a showing that the prosecution is based on an unjustifiable standard or arbitrary classification. See, e.g. Oyler v. Boles, supra.

Examination of the transcript of testimony from the hearing below fails to reveal that the Hustler prosecution was based on any deliberate discrimination involving an arbitrary classification. The selection of Hustler for a test case, in fact, was based on sever l rational factors differentiating

it from magazines of the same format. Accordingly, we hold that the court below erred in dismissing the case based on the doctrine of discriminatory prosecution, and that the appellant's assignment of error is well taken.

The order of the trial court granting the appellees' motion to dismiss is reversed and the case remanded for further proceedings.

This cause is remanded to the Cleveland Municipal Court for further proceedings.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure, Exceptions.

PRYATEL, J.

PATTON, J., CONCUR

/s/Alvin I. Krenzler
PRESIDING JUDGE
ALVIN I. KRENZLER

Appearances:

For Plaintiff-Appellant: Almeta A. Johnson

For Defendant-Appellees: Bernard A. Berkman

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

State of Ohio — Court of Appeals No. 48079

Appellant — Lower Court No. Cleve. Muni. Ct. 76. CRB 16688, 76 CRB 16687 16689

-vs-

Larry C. Flynt, et al. — Motion No. 43219

Appellees

Date MAR 2 1979

JOURNAL ENTRY

Motion by appellee for reconsideration overruled. Exc.

KRENZLER, P. J.,

PRYATEL, J., CONCURS

PATTON, J., NOT PARTICIPATING

/s/Alvin I. Krenzler
Presiding Judge
ALVIN I. KRENZLER

IN THE CLEVELAND MUNICIPAL COURT

CUYAHOGA COUNTY, OHIO

Case Nos. 76 CRB 16687 A & B
76 CRB 16688 A & B
76 CRB 16689 A & B

STATE OF OHIO X

Plaintiff X (Judge Salvatore R. Calandra)

-vs- X

JIMMY R. FLYNT X
LARRY C. FLYNT
ALTHEA LEASURE FLYNT X

Defendants X

MEMORANDUM TO ATTORNEYS

The defendants have filed multiple motions seeking dismissal of the charges. Briefs have been filed and argued during two lengthy hearings.

Several rulings have been made by this Court prior to this date. The Court has ruled that Section 2907.32 of the Ohio Revised Code which defines the crime of pandering obscenity is constitutional. Further, the Court has ruled that the two issues of the magazine are obscene as a matter of law and not entitled to protection under the First Amendment.

The Court directs its attention now to defendants' motion to dismiss on the ground that the complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment.

The testimony of the Assistant Prosecutor, whose basic duty is the prosecution of obscenity cases, was that guidelines had been established as to what matters were to be prosecuted; that these guidelines were solely concerned with the hard core pornography; that the only prosecutions to date were for publications violative of these hard core pornograph guidelines; that the magazines presented to date were sold solely in "Adult" bookstores; that there were other magazines, available generally throughout the community, which contained some hard core material; that none of these magazines were the subject of any prosecution; that the magazine in question did not contain hard core material and that magazines, similar to the magazines

in question, available at the same location and in the same manner as this magazine, had not and were not being presented.

The Court does not take into consideration that this is the first prosecution of this type of magazine or of this type of defendants. However, the Court must take into consideration that not only is this the first but it is also the only such prosecution and that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976.

While varied essential elements need be present for the successful prosecution of the crime of pandering obscenity, whether it be by a corporation or an individual, the basic issue is the obscenity of the periodical. If it is obscene, then whoever sells, distributes or publishes it is subject to prosecution. If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to

select and prosecute this magazine and this magazine only, presents a serious constitutional question. It is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action.

While this Court certainly disagrees with some of the conclusions and interpretations recited by the prosecutor, as to whom and what to prosecute, for the purposes of this motion this Court is limited by that testimony and must search that testimony objectively in relationship to the constitutional guidelines established by a series of previous judicial decisions on the discriminatory prosecution question.

It is this Court's decision that the testimony supports the allegations of the defendants. The motion will be granted and the charges will be dismissed against these defendants.

/s/Salvatore R. Calandra
SALVATORE R. CALANDRA, Judge
Cleveland Municipal Court
Courtroom #11, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
621-6345

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16688 A & B

THE STATE OF OHIO)
County of Cuyahoga) ss.
City of Cleveland)

City of Cleveland)
)
vs.)
)
Larry Flynt)

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16687 A & B

THE STATE OF OHIO)
County of Cuyahoga) ss.
City of Cleveland)

City of Cleveland)
)
vs.)
)
Jimmy Flynt)

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16689 A & B

THE STATE OF OHIO)
County of Cuyahoga) ss.
City of Cleveland)

City of Cleveland)
)
vs.)
)
Althea Leasure)

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

...

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse, fellatio, and cunnilingus between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juvelines," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or

brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicy disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

PROPOSITION OF LAW PRESENTED
TO THE OHIO SUPREME COURT

In a criminal prosecution for the distribution of materials which are arguably protected by the First Amendment of the United States Constitution, where the defendant has presented a prima facie case of unconstitutional discriminatory prosecution, the State then has the burden of rebutting the prima facie showing to avoid a finding of discriminatory prosecution.

No. 80-420

In The

Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners.

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

JOINT APPENDIX

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DOCKET SHEET
OHIO SUPREME COURT

THE SUPREME COURT OF OHIO,
JANUARY TERM, 1979
CASE NO. 79-556

TITLE OF CASE

State of Ohio,
Appellee,

Larry C. Flynt et al.
Appellants.

ACTION

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY.

ATTORNEYS

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Chief Prosecutor
City of Cleveland

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Docket Sheet, Ohio Supreme Court

DATE	MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED ETC., JUDGMENTS, ORDERS AND DECREES
April 30 1979	Notice of Appeal
April 30 1979	Memo of Appellant extended to May 4, 1980 (56-222)
May 2, 1979	Memo of Appellant and Certificate of Service
June 1, 1979	Memo of Appellee and Certificate of Services
Sept 13 1979	Motion to Certify Record, Allowed (56-389)
Sept 13, 1979	Cause Docketed on its Merits
Sept 13, 1979	Order to Certify Record Sent Clerk of Courts
Oct. 12, 1979	Original Papers filed
Oct. 25, 1979	Brief of Appellant extended to Nov. 2, 1979 (56-481)
Nov. 2, 1979	Brief of Appellant filed
Dec. 7, 1979	Brief of Appellee extended to Dec. 12, 1979 (56-539)
Dec. 12, 1979	Brief of Appellee filed
July 16, 1980	Judgment affirmed (57-173)
Aug. 5, 1980	Mandate Issued
Aug. 5, 1980	Certified Copy of Entry sent to Clerk
Sept. 3, 1980	Original Papers returned to Clerk
Dec. 10, 1980	Entry from U.S. Supreme Court—Certiorari Allowed

Docket Sheet, Ohio Supreme Court

CASE No. 79-556 STATE V. FLYNT ET AL.

ENTRY

Thursday, September 13, 1979

State of Ohio,
Appellee,

v.

Larry C. Flynt et al.,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEAL FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

Wednesday, July 16, 1980

State of Ohio,
Appellee,

v.

Larry C. Flynt et al.,
Appellants.

APPEAL FROM THE COURT OF APPEAL FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Cleveland Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga county for entry.

I, Sam F. Adkins, Deputy Clerk, Supreme Court of Ohio, do hereby certify that these documents are true and correct copies of the entries of this court in the above subject case and a true and correct copy of the docket page of this court in subject case.

/s/ SAM F. ADKINS

Dated this 15th day of December, 1980.

(SEAL)

MEMORANDUM TO ATTORNEYS OF JUDGE CALANDRA
Cleveland Municipal Court

STATE OF OHIO

Plaintiff

vs.

JIMMY R. FLYNT
LARRY C. FLYNT
ALTHEA LEASURE FLYNT

Defendants.

Case Nos. 76 CRB 16687 A & B
76 CRB 16688 A & B
76 CRB 16689 A & B

(Judge Salvatore R. Calandra)

MEMORANDUM TO ATTORNEYS

The defendants have filed multiple motions seeking dismissal of the charges. Briefs have been filed and argued during two lengthy hearings.

Several rulings have been made by this Court prior to this date. The Court has ruled that Section 2907.32 of the Ohio Revised Code which defines the crime of pandering obscenity is constitutional. Further, the Court has ruled that the two issues of the magazine are obscene as a matter of law and not entitled to protection under the First Amendment.

The Court directs its attention now to defendants' motion to dismiss on the ground that the complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment.

The testimony of the Assistant Prosecutor, whose basic duty is the prosecution of obscenity cases, was that guidelines had

been established as to what matters were to be prosecuted; that those guidelines were solely concerned with the hard core pornography; that the only prosecutions to date were for publications violative of these hard core pornography guidelines; that the magazines presented to date were sold solely in "Adult" bookstores; that there were other magazines, available generally throughout the community, which contained some hard core material; that none of these magazines were the subject of any prosecution; that the magazine in question did not contain hard core material and that magazines, similar to the magazines in question, available at the same location and in the same manner as this magazine, had not and were not being presented.

The Court does not take into consideration that this is the first prosecution of this type of magazine or of this type of defendants. However, the Court must take into consideration that not only is this the first but it is also the only such prosecution and that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976.

While varied essential elements need be present for the successful prosecution of the crime of pandering obscenity, whether it be by a corporation or an individual, the basic issue is the obscenity of the periodical. If it is obscene, then whoever sells, distributes or publishes it is subject to prosecution. If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to select and prosecute this magazine and this magazine only, presents a serious constitutional question. It is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action.

While this Court certainly disagrees with some of the conclusions and interpretations recited by the prosecutor, as to

whom and what to prosecute, for the purposes of this motion this Court is limited by that testimony and must search that testimony objectively in relationship to the constitutional guidelines established by a series of previous judicial decisions on the discriminatory prosecution question.

It is this Court's decision that the testimony supports the allegations of the defendants. The motion will be granted and the charges will be dismissed against these defendants.

/s/ SALVATORE R. CALANDRA

SALVATORE R. CALANDRA, Judge
Cleveland Municipal Court
Courtroom #11, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
621-6345

JOURNAL ENTRY AND OPINION
Court of Appeals of Ohio, Eighth District
COUNTY OF CUYAHOGA
NO. 38079

STATE OF OHIO

Appellant

vs.

LARRY C. FLYNT, ET AL.

Appellees

DATE FEB 8 1979

APPEAL FROM

CLEVELAND MUNICIPAL COURT
No. 76 CRB 16688, 16687 & 16689

JOURNAL ENTRY AND OPINION

KRENZLER, P.J.:

This cause came to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On July 14, 1976, complaints were issued against the defendant-appellees Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure in the Cleveland Municipal Court, alleging violations of R.C. 2907.32(A)(2) governing the pandering of obscenity.[1] The complaints alleged that the appellees were

[1] R.C. 2907.32(A) provides in part:

"No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material. . . ."

officers, agents, or employees of Hustler Magazine. The offenses charged were based upon the July and August, 1976 issues of that publication.

The appellees moved to dismiss the complaints upon the ground of discriminatory prosecution. Although a copy of the motion is not contained in the record before this court on appeal, a hearing on the motion was held by the trial court on February 28, 1977. On May 17, 1977, the appellees' motion to dismiss was granted, and the appellees were ordered discharged.

The appellant, State of Ohio, is appealing from the trial court's decision granting the appellees' motion, and assigns the following error:

> THE SELECTION OF "HUSTLER" MAGAZINE FOR OBSCENITY PROSECUTION IS NOT AN EXERCISE OF UNCONSTITUTIONAL DISCRIMINATION.

At the hearing below, the principal witness for the appellees was Bruce A. Taylor, Assistant Director of Law with the City of Cleveland and the prosecutor assigned to prosecute obscenity cases. Mr. Taylor testified that he had been on this assignment for two years, ever since becoming an attorney. Since 1973 there had been approximately 500-550 obscenity arrests in Cleveland, and of this total, one-half to two-thirds involved films and the remainder involved magazines.

Mr. Taylor stated that written guidelines had been developed for the police department three to four years earlier to guide them in making arrests for obscenity. He testified that he had never relied on these guidelines, and that police officers were concentrating on "mostly hard-core meaning actually [sic] instead of simulated acts of sex, and where ejaculation, et cetera, is shown." (Tr. 14). He did not know whether the

written guidelines on obscenity arrests were still controlling, and testified that he had never seen them. He had instructed police to concentrate on "more explicit" as opposed to "less explicit" materials.

To Mr. Taylor's knowledge, there had been no prosecution of publications involving only written material. To his knowledge there had been only two prosecutions invoiving materials, such as Hustler, not depicting explicit sexual activity.

Regarding the prosecution of Hustler, Mr. Taylor testified that a copy of the July issue of that magazine had been sent to the Cleveland Police Department, and that several complaints were made regarding a cartoon depicting prominent political figures engaged in sexual activity with the Statue of Liberty. The police officers brought the magazine to Mr. Taylor, who examined its overall content. He stated that while the cartoon was "one of the reasons they were prosecuted" it was not "one of the reasons they were charged." He also stated that in his opinion the magazines were legally obscene.

He also stated that the city had never prosecuted a magazine like Hustler, and that this was the first prosecution of a magazine having a second-class mailing privilege and nationwide distribution. A number of "men's magazines" had been under investigation for eight monhs, but no prosecutions had been initiated.

At this point in the hearing, the following dialogue took place:

> Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience here as a prosecutor?
>
> A. Well, it's unusual — this is the first time it has happened because we're waiting for this case.
>
> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud —

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed. (Tr. 92)

Mr. Taylor stated that the other men's magazines referred to by appellees' counsel were comparable to Hustler.

Officer Steven Nemeckay of the Cleveland Police Department Obscenity Detail testified that he had purchased the two issues of Hustler upon which the prosecution was based at the instruction of Mr. Taylor. The issues were taken to several judges, and their determination regarding its contents led to the filing of the complaints.

Subsequently, the order of dismissal based on discriminatory prosecution was entered, and the state brought this appeal.

The question presented by this appeal is whether the appellees made a proper showing of discriminatory prosecution so as to entitle them to discharge.

It is well settled that upon a proper showing of discriminatory prosecution a criminal defendant is entitled to discharge. The principle of law underlying such a discharge is that although a statute or ordinance may be fair and impartial on its face, the equal protection clause of the Fourteenth Amendment prohibits the application and administration of such laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-74. In *Yick Wo v. Hopkins, supra*, the Supreme Court overturned the petitioners' convictions on the ground that the prosecution against them were based solely on their race and nationality.

Where a claim of discriminatory prosecution is considered, the standard to be followed is whether the selection of the defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles* (1962), 368 U.S. 448; *State v. Wolery* (1976), 46 Ohio St. 2d 316, *cert. denied* 429 U.S. 932. *See also State v. Steurer* (1973), 37 Ohio App. 2d 51; Annot., 4 A.L.R. 3d 404.

In a leading case in this area of the law, it was stated that the question to be answered is "whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason. The wrong to be prevented is a wrong by the public authorities." *People v. Utica Daw's Drug Co.* (1962), 16 App. Div. 2d 12, 17-18.

While the doctrine of discriminatory prosecution is well established, it should not be equated with mere selectivity in prosecution, without a concomitant showing of deliberate discrimination based on an unjustifiable standard. Taken alone, the conscious exercise of some selectivity in enforcement is not a federal constitutional violation. *Oyler v. Boles, supra* at 456. *See State v. Wolery, supra.* Accordingly, the Ohio Supreme Court has noted the "discretion vested in a public prosecutor to exercise selectivity in the enforcement of criminal statutes." *State v. Wolery, supra* at 325. The burden of proving conscious, intentional discrimination is upon the defendant and is a heavy one. *People v. Utica Daw's Drug Co.*, supra at 19.

The bounds of prosecutorial discretion to selectively prosecute offenders was examined at some length in *People v. Utica Daw's Drug Co., supra.* In that case, the court pointed

out that such selectivity may be justified where "the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity." *Id.* at 21. Such a method of prosecution "may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary." *Id.* It is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present. Nevertheless, "[i]t is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found." *Id.*

Applying the above principles to the instant case, it is clear that the appellees demonstrated that other "men's magazines" with a format similar to Hustler were not yet being prosecuted. It was also shown that such magazines were being sold in the same sort of stores as Hustler, and that the authorities were aware of their existence and general content.

At the same time, the prosecutor who testified at trial stated that the prosecution of Hustler was a test case. Although the magazine was brought to the attention of public authorities in part because of an offensive cartoon, the prosecutor provided several reasons why Hustler was chosen for a test case. First, he maintained that while it contained essentially the same format as other magazines, some portions were more offensive than those in similar magazines. Second, he stated that to his knowledge, prosecution of officers of out-of-state magazines would at the least entail greater difficulties of service of process

and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

Also, taking the testimony from the hearing below in context, the testimony of Mr. Taylor, an assistant Director of Law, was not sufficient to meet the appellees' burden of proof as to intentional discrimination. In particular, he stated that he was not in a position to make the decision of whether the other "men's magazines" under investigation would be prosecuted if the Hustler prosecution were successful.

> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud —
>
> A. I don't know. That decision, I can't make alone either. (Tr. 92)

If Mr. Taylor had stated that he was in a position to decide whether to prosecute the other publications, his testimony that they had not yet been prosecuted would perhaps be some evidence of discriminatory intent. Absent testimony from his superiors, however, there was no reliable basis upon which the trial court could infer that the City of Cleveland would not follow up a successful result in the Hustler case with additional prosecutions. Taking the testimony of Mr. Taylor alone, on the other hand, the court had before it no substantial evidence to support a conclusion that Hustler alone would be prosecuted, much less that this selectivity was based on constitutionally prohibited discrimination. Accordingly, in order to sustain their burden, the appellees should have at least presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format. Such testimony might have provided a reliable basis for a conclusion that discriminatory intent was indeed present. Absent such testimony, we must conclude that the appellees did

not present evidence of such quality to sustain their burden of proof as to the intent underlying the decision to prosecute Hustler.

Our conclusion should be viewed in light of the fact that the burden of proving conscious discriminatory intent is upon the defendant and is a heavy one. *People v. Utica Daw's Drug Co., supra*. Also, as discussed earlier, selectivity in prosecution alone is not sufficient to demonstrate a constitutional violation absent a showing that the prosecution is based on an unjustifiable standard or arbitrary classification. *See, e.g. Oyler v. Boles, supra*.

Examination of the transcript of testimony from the hearing below fails to reveal that the Hustler prosecution was based on any deliberate discrimination involving an arbitrary classification. The selection of Hustler for a test case, in fact, was based on several rational factors differentiating it from magazines of the same format. Accordingly, we hold that the court below erred in dismissing the case based on the doctrine of discriminatory prosecution, and that the appellant's assignment of error is well taken.

The order of the trial court granting the appellees' motion to dismiss is reversed and the case remanded for further proceedings.

Journal Entry and Opinion
Court of Appeals of Ohio, Eighth District

RECEIVED FOR FILING
FEB - 8 1979
GERALD E. FUERST
Dep.
/s/ PEGGY MAGUET

This cause is remanded to the Cleveland Municipal Court for further proceedings.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PRYATEL, J.,
PATTON, J., CONCUR

/s/ ALVIN I. KRENZLER
PRESIDING JUDGE
ALVIN I. KRENZLER

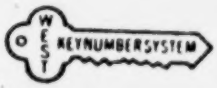
Appearances:

For Plaintiff-Appellant: Almeta A. Johnson

For Defendant-Appellees: Bernard A. Berkman

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

OHIO SUPREME COURT DECISION, STATE v. FLYNT
63 Ohio St.2d 132, 407 N.E.2d 15



63 Ohio St.2d 132

The STATE of Ohio, Appellee,

v.

FLYNT et al., Appellants.

No. 79-556.

Supreme Court of Ohio.

July 16, 1980.

Defendants charged with obscenity offenses moved to dismiss the complaint on the basis that they were discriminatorily prosecuted. The trial court dismissed the charges, but the Court of Appeals for Cuyahoga County reversed. Defendants appealed. The Supreme Court held that the defendants did not sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution, but in order to sustain their burden, the defendants had to present testimony from individuals responsible for deciding the intended course of future obscenity prosecutions.

Affirmed.

Paul W. Brown, J., filed a dissenting opinion.

1. Criminal Law Key 31

Conscious exercise of some selectivity in enforcement is not in itself a violation of the Constitution, but in order for selective enforcement to reach level of unconstitutional discrimination, discrimination must be intentional or purposeful. U.S.C.A. Const. Amend. 14.

Ohio Supreme Court Decision, State v. Flynt,
63 Ohio St.2d 132, 407 N.E.2d 15

2. Criminal Law Key 330

Burden on defendant to show intentional or purposeful discriminatory prosecution is a heavy one and will not be presumed. U.S.C.A. Const. Amend. 14.

3. Criminal Law Key 569

Defendants charged with obscenity offenses did not sustain burden of establishing prima facie case of unconstitutional discriminatory prosecution, but in order to sustain their burden, defendants had to present testimony from individuals responsible for deciding intended course of future obscenity prosecutions. U.S.C.A. Const. Amend. 14.

On July 14, 1976, complaints were issued against defendants-appellants, Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, for allegedly pandering obscenity in violation of R.C. 2907.32(A)(2), complicity in violation of R.C. 2923.03(A)(2) and personal accountability for organizational conduct in violation of R.C. 2901.24(A)(1). The complaints alleged that the defendants, as officers, agents or employees of Hustler magazine, caused, or permitted, the exhibition or dissemination of materials known to be obscene, to wit, the July and August, 1976, issues of Hustler magazine.

The defendants moved to dismiss the complaints on the basis that they were discriminately prosecuted, in contravention of the Equal Protection Clause of the Fourteenth Amendment. The trial court granted an evidentiary hearing on the motion, whereupon the following facts were elicited, primarily from Bruce A. Taylor, the assistant law director for the city of Cleveland. Taylor had been in charge of the city's obscenity prosecution when these complaints were issued.

It was testified that since April of 1973 the city of Cleveland had initiated between 500 and 550 obscenity prosecutions. The

materials selected for prosecution were largely determined in accordance with instructions given by Taylor to police officers, although the officers were given considerable latitude to exercise their own discretion. The instructions provided that applicable Supreme Court decisions proscribed the sale of "obscenity which is hard-core." "Hard-core" was understood to encompass "actually instead of simulated acts of sex." The officers were further instructed to seize the "most explicit of the material available." Enforcement therefore concentrated on "adult book-stores and theaters." There was also testimony that certain materials which may not have contained "actual sexual contact" were, nevertheless, seized and prosecuted. It was conceded by Taylor, that "[w]e had never prosecuted a magazine like Hustler."

Further testimony revealed that the police department received complaints about the July 1976 issue of Hustler, and, in particular, a cartoon depicting sexual activity between prominent political figures and the Statue of Liberty. An investigation ensued, whereupon a copy of the issue was brought to Taylor, who subsequently decided to initiate action against the magazine.

Taylor asserted that Hustler was prosecuted as a test case. Other magazines of a similar nature had been under investigation for eight months without being prosecuted. He conceded that such an extended investigation was unusual. When questioned why he did not prosecute these magazines, Taylor stated that he was "waiting for this case." When he was asked whether further prosecutions would follow, should he receive a favorable decision in this case, Taylor responded, "I don't know. That decision I can't make alone either" but "[i]t's being discussed."

On the basis of this testimony and the testimony of a Cleveland police officer working obscenity cases, the trial judge

determined that the defendants were prosecuted discriminatorily, in violation of the Fourteenth Amendment, and dismissed the complaints. The Court of Appeals reversed, holding that the defendants failed to sustain their burden of proof.

The cause is now before this court upon the allowance of appellants' motion to certify the record.

Almeta Johnson, Chief Police Prosecutor, and Bruce A. Taylor, Cleveland, for appellee.

Berkman, Gordon, Kancelbaum, Levy & Murray, Bernard A. Barkman, George W. Palda, Cleveland, Herald Price Fahringer and Paul J. Cambria, Jr., New York City, for appellants.

PER CURIAM.

The law is well settled that the government is subject to constitutional restraints in its choice of those whom it may prosecute. As long ago as *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220, the United States Supreme Court stated that although a "law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," there is a denial of equal protection of the laws.

[1] The conscious exercise of some selectivity in enforcement is not in itself, however, a violation of the United States Constitution. *Oyler v. Boles* (1962), 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446. In order for selective enforcement to reach the level of unconstitutional discrimination the discrimination must be "intentional or purposeful." *Snowden v. Hughes*

(1944), 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. This concept of "intentional or purposeful discrimination" was explained in *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211, as follows:

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' " This test has been recognized by numerous courts. See *United States v. Murdock* (C.A.5, 1977), 548 F.2d 599, 600; *United States v. Ojala* (C.A.8, 1976), 544 F.2d 940, 943; *United States v. Legget & Platt, Inc.* (C.A.6, 1976), 542 F.2d 655, 658, certiorari denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977); *United States v. Bourque* (C.A.1., 1976), 541 F.2d 290, 292—293; *United States v. Peskin* (C.A.7, 1975), 527 F.2d 71, 86, certiorari denied, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976); *United States v. Scott* (C.A.9, 1975), 521 F.2d 1188, 1195, certiorari denied, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976).

Applying these principles to the instant cause it must be conceded that defendants demonstrated that other magazines with a format similar to Hustler, sold in the same stores as that magazine, were not yet being prosecuted, although the authorities were aware of their existence and general content. There are, however, several legitimate reasons testified to at

trial as to why Hustler magazine was chosen as a test case.[1] The prosecutor, for example, testified that while it contained a similar format as other magazines on the market, that some portions of Hustler were more offensive than those in the compared magazines. It was also testified that the prosecution of out-of-state magazines would entail greater difficulties in service of process and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

In addition, the defendants did not establish that Hustler alone would be prosecuted. The prosecutor in this cause stated that he did not have the authority to make the decision concerning subsequent prosecutions of other magazines. Testimony from his superiors was necessary to infer that the city of Cleveland would not follow up a successful result in the instant cause with the bringing of additional prosecutions.

[2, 3,] The burden on a defendant to show intentional or purposeful discrimination is a heavy one, *Berrios, supra*, and will not be presumed, *Snowden, supra*. We hold that the defendants herein did not sustain their burden of establishing a

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[1]The validity of pursuing a test case and its relationship to the doctrine of discriminatory prosecution was explored in the case of *People v. Utica Daw's Drug Co.* (1962), 16 A.D.2d 12, 225 N.Y.S.2d 128, 136, where it was stated:

> "Selective e cement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found."

prima facie case of unconstitutional discriminatory prosecution. In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions.

Accordingly, the judgment of the Court of Appeals is affirmed.[2]

Judgment affirmed.

CELEBREZZE, C. J., and HERBERT, WILLIAM B. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

PAUL W. BROWN, Justice, dissenting.

I agree with the test used by the majority and I also agree that there is a heavy burden upon the defendants to demonstrate intentional or purposeful discrimination. I would hold, however, that the defendants sustained this burden and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.

It is well-settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in every reasonable presumption in favor of findings made by the court below as a basis for its decision. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See *Brescoll v. Nationwide Mut. Ins. Co.* (1961), 116 Ohio App. 537, 543, 189 N.E.2d 173; *Thayer v. Shorey* (1934), 287 Mass.

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[2]Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper determination of the credibility of the witnesses at trial.

76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle.

Applying the test used by the majority, governing discriminatory prosecutions, quoted from *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211, it is apparent that the first prong of that test is met. The defendants presented evidence, the witness Taylor conceded, and the trial court found,[1] that the city of Cleveland had never before prosecuted a magazine like Hustler, despite the fact that magazines similar to or pictorially "stronger" than Hustler were available within the community. Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. Lengthy investigations of similar magazines were dropped without taking even preliminary steps toward prosecution. Taylor's attempted justification, *i.e.*, that he was awaiting the outcome of this case, was contradicted by his subsequent testimony concerning the likelihood of general enforcement in the future if he received a favorable judgment in the case. When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors—this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler. Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons.

In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony

[1]There are no findings of fact or conclusions of law in the record. There is, however, a document entitled "Memorandum to Attorneys," authorized by the trial judge, indicating some of the factual considerations supporting his decision. Any reference to the trial court's "findings" are derived from this document.

supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, improperly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present.

As to the second prong of the *Barrios* test, *i.e.*, that the discriminatory selection is invidious or in bad faith if based upon impermissible considerations, substantial evidence was presented to establish that the prosecution was initiated (1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights. Either motivation, standing alone, would be a sufficient basis for a finding of invidious selection or bad faith.

Taylor explained that he would need to consult his superiors concerning future prosecutions of magazines similar to Hustler because of publicity surrounding obscenity prosecutions. Taylor stated that public reaction was a legitimate consideration in obscenity cases because strong public interest impeded the speedy disposition of these cases and because public response was a barometer of the community's perception of obscenity. The trial court properly took exception to these proffered justifications as a basis for selecting cases to prosecute. The judge noted that the progress of a trial is not a function of attendant publicity, nor should public reaction be used as an index to the community's ideas as to what constitutes obscenity; such a determination being within the domain of a jury. A reasonable inference to be drawn from this testimony, and one which the trial court apparently drew,[2] is that the defendants

[2]The court asked witness Taylor:

> "Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute, or the city of Cleveland, that you first determine what the public feels about it before you proceed * * *?"

were prosecuted on the basis of unfavorable public sentiment. Upon this evidence the trial court could reasonably have found that this prosecution was initiated in "bad faith," *i.e.*, that it was grounded upon an arbitrary standard to pursue only those whom the public held in disfavor. As the court noted in *United States v. Torquato* (C.A.3, 1979), 602 F.2d 564, 568:

"* * * To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias." It is our obligation to prevent such personal abuses of governmental power.

There are also indications that the prosecution was brought to chill the defendants' First Amendment rights. There was strong evidence that the prosecution was initiated on the basis of the political cartoon depicting sexual activity between political figures and the Statue of Liberty (as well as the cartoon displaying Uncle Sam with his pants down). This was admitted during the course of a television interview and at the hearing, although Taylor subsequently attempted to retract and qualify these statements. Taylor conceded that the cartoon was "the most protected thing in the whole magazine." He could hardly argue otherwise, in light of *Papish v. Univ. of Missouri Curators* (1973), 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618, wherein the United States Supreme Court held that a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice was not constitutionally obscene. This testimony alone served as an independent basis for the trial court to find bad faith through the inhibition of First Amendment rights.

I conclude that having made a proper showing of discriminatory prosecution, the defendants are entitled to discharge. Such a determination in no way reflects upon the

guilt or innocence of the defendants.[3] If, and when, the public authorities decided to undertake a generalized enforcement of the law, the defendants could again be charged.

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[3]"The question is * * * whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or some other illegitimate reason. The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a generally disregarded law is to place in the hands of the police and the prosecutor a power of the type frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies. The court is asked to stop the prosecution at the threshold, not because the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant." *People v. Utica Daw's Drug Co.* (1962), 16 A.D.2d 12, 21, 225 N.Y.S.2d 128, 133.

TRANSCRIPT OF PROCEEDINGS

THE STATE OF OHIO,)
COUNTY OF CUYAHOGA,) SS: CALANDRA, J.
CITY OF CLEVELAND.)

IN THE CLEVELAND MUNICIPAL COURT

STATE OF OHIO,

Plaintiff,

vs.

JIMMY R. FLYNT, and
LARRY C. FLYNT, and
ALTHEA LEASURE FLYNT,

Defendants.

Case Numbers:
76 CRB 16687A, 76 CRB 16687B
76 CRB 16688A, 76 CRB 16688B
76 CRB 16689A, 76 CRB 16689B

FEBRUARY 28, 1977

APPEARANCES:

On behalf of the Plaintiff:
Bruce A. Taylor, Esq.,
Assistant Law Director.

On behalf of the Defendants:
Lipsitz, Green, Fahringer, Roll,
Schuller & James, by
Herald Price Fahringer, Esq., and
Paul J. Cambria, Jr., Esq.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that at the January, A.D. 1977 term of said Court, to wit, on Monday, the 28th day of February, 1977, this cause came on to be heard before the Honorable Salvatore R. Calandra, one of the Judges of said Court in courtroom number eleven.

PRELIMINARY REMARKS

PROCEEDINGS

THE COURT: Just as a matter of summary, Mr. Fahringer, I believe that we had discussed most of the motions which were presented by the defendants; and we were at the position where probably the bill of particulars, at that time, had not been fully—

MR. FAHRINGER: Yes.

THE COURT: —presented. Is that true?

We had not explored as of yet the question of separate trials, nor the question of discriminatory prosecution—

MR. FAHRINGER: Your Honor, we've got the — we're happy to report to you that we got a bill of particulars, and my understanding was that, if it please Your Honor, today what we would do is take some testimony on the claim of discriminatory prosecution or selective enforcement.

THE COURT: If possible, I would like to conclude today, if possible, the various motions you have before us.

MR. FAHRINGER: That's our ambition, too, Judge.

THE COURT: All right. Fine.

MR. FAHRINGER: Your Honor, you might be — to conserve the court's time, I just spoke to Mr. Taylor.

In view of the fact he has, as I understand it, Your Honor, and we'll try to develop this more fully in trial, been the lawyer who has been responsible for a number of these prosecutions. I thought it might save some time if we started with him, and I explained that to him. I know he testified in one of the other proceedings in this fashion. So I wonder if we could call him, and start with him.

It might save time because I might indicate that it might obviate the calling of all the police officers at least—

THE COURT: Fine. Anything that, Mr. Fahringer, accomplishes the purpose that we're here for.

MR. FAHRINGER: Your Honor, would you entertain a motion, in view of the fact that the other police officers might be called, that we have a sequestration of witnesses?

THE COURT: All those police officers who might be called with the exception of who, Bruce, would be your one person; that would be the sergeant or somebody else—

MR. TAYLOR: Yes. I'll keep—

THE COURT: Then all the other police officers—

MR. TAYLOR: Not testifying—

THE COURT: —with the exception of who might testify—

MR. FAHRINGER: I take it that Officer McNamara doesn't know anything about this case?

MR. TAYLOR: He does know something about it. I don't imagine he will be testifying.

THE COURT: Well, if he stays in here, he can't testify.

MR. TAYLOR: He was with this officer when they went to the George Klein News.

MR. FAHRINGER: Would it bother you, Bruce, if we had them all excluded—

THE COURT: Mr. Taylor, why don't you just put everybody out in the corridor, all right?

MR. FAHRINGER: What about—

MR. TAYLOR: He had nothing to do with it as far as being a police officer—

MR. FAHRINGER: All right.

BRUCE A. TAYLOR BY MR. FAHRINGER

BRUCE A. TAYLOR, of lawful age, having been first duly sworn, was examined and testified as follows:

EXAMINATION OF BRUCE A. TAYLOR

BY MR. FAHRINGER:

Q. Mr. Taylor, would you identify yourself, please?

A. Yes. Bruce A. Taylor. I'm the Assistant Director of Law with the City of Cleveland, and formerly Assistant Prosecuting Attorney for the Office of the Prosecutor.

Presently the prosecutor assigned to prosecute obscenity cases.

Q. How long have you been with the agency you are now working with?

A. I'm presently with the Law Department, as of last Tuesday. I'm still assigned to obscenity prosecutions which I have been, exclusively, in my jurisdiction for the past two years in the prosecutor's office.

Q. And that's what I was really searching for.

How much time have you spent either working obscenity cases or in a supervisory capacity, as far as the obscenity prosecutions in the City are concerned?

A. I came to the office of the Cleveland prosecutor four and a half years ago, and approximately four years ago I began as a law student working with the prosecutors who did obscenities.

Two years ago, when I became a lawyer, I took over the job of handling all the prosecutions for the City of Cleveland, and I handled all the trials of pretrial memorandums almost exclusively for the past two years.

Q. All right. Fine. That's what I was looking to establish.

Now, can you give us, roughly, or precisely, if you can, during that period of time you just described to us, how many obscenity prosecutions have been launched by the City?

A. Okay. If you excuse me, I will—

Now, since April 1973, when the Mayor's police unit on obscenity was formed just to investigate obscenity, they made, roughly 500 — 550 arrests.

We have specific statistics for 1974-'75 combined, and separately for 1976.

In '74 and '75, there were 225 arrests. Sixteen of which are still pending, 49 were dismissed, 136 were pleas of guilty, 12 were acquittals at trial, eight found guilty at trial and five were reversed on appeal.

For the year 1976, there were 158 arrests—

Q. Would you take them slowly; I was just trying to record—

A. 1976, 158 arrests. Thirty-two dismissed by the court, 17 nolled by the prosecution, 29 pleas of guilty, 15 found guilty at trial and 65 pending, roughly—

Q. Beg your pardon?

A. There are roughly 65 pending as far as we—

Q. That are still—

A. Still active.

Q. All right. Now, during this period of time when arrests were being made, and incidentally, I might ask you do you make any distinction at all between an arrest and a prosecution; are there any instances when an arrest is made and a judgment is then made not to prosecute, so that those figures might be more meaningful to us?

A. As far as I know, I have no knowledge of any arrests made by the police which did not result in a prosecution at least being filed.

Q. I take it that the procedure normally is, when the arrest is made, it is based on the complaint that has been formalized and probably signed by a Judge?

A. That's correct as to magazines.

As to films, there is a search warrant which is signed by a judge, and the arrest is made at the time the search warrant is executed.

Q. I wonder if it wouldn't take too much time if you could just tell us more formally what is the procedure in initiating a charge with a magazine through the court?

A. With a magazine, the officers go to an establishment and pick something out which they feel is evidence and attempt to purchase it if possible.

If they can purchase, they buy it and leave the store not making any arrests.

They come back to their office and type up a complaint which has a place for a judge to sign; and then they ask a judge to sign the complaint as to whether the material is obscene for probable cause purposes. Once the judge does that, they have a prosecutor sign it, and the Clerk issues the warrant; and they go back and find the person they bought it from and arrest him.

If they can buy the magazine — and we had one case where they didn't buy the magazine, and they made a description of it; and in some cases where they were given a copy from someone else and had a search warrant made out describing that magazine—

Q. And seize it—

A. Seize it with a search warrant.

Q. What is the procedure with motion pictures?

A. With motion pictures, the officer goes to the book store, which most of these films are 25 cent peep show, eight millimeter variety; or, if he goes to a regular theater, he views the film and goes back to the office and makes out an affidavit for a search warrant which describes the contents of the film. After making out the affidavit for a search warrant, he presents

it to a judge. If the judge issues a search warrant, they go out to the premises, and if they can find the film, they seize it and effect the arrest of the defendant at the time.

Q. Now, do you have any statistics, Mr. Taylor, in terms of your prosecution, as to how many involved magazines or written material or photographic material, and how many involved films?

A. I don't have any specific statistics on it. The officers might be able to make a better guess. I don't think they ever compiled a number like they did for arrests in cases; but, prior to 1976, they were mostly maybe two-thirds films, and one-third magazines.

In 1976, they seemed to have about half and half—

Q. All right. Now, did you establish, during this period of time, written guidelines that were developed by your office to be used in one guiding prosecutions, and guiding arrests?

A. There had been guidelines drawn up and given to the police department at least, probably, three or four years ago. Before I was involved with it—

THE COURT: Just one second.

(Discussion had off the record.)

BY MR. FAHRINGER:

Q. Thank you.

I'm sorry, we interrupted you, Mr. Taylor.

A. That's okay.

Those guidelines, apparently, are referred to by the police. I have never relied on them. I instruct the police to, you know, use their discretion just based on the law. Since the Supreme Court mentions, in the Miller case and in the Paris art case, that it shall now be prohibited to protect or to sell obscenity which is hard-core. I defined to them what I thought hard-core meant.

Bruce A. Taylor by Mr. Fahringer

Now, naturally, they have been concentrating, mostly, on what we call adult bookstores and theaters which contain usually what we call "mostly hard-core" meaning actually instead of simulated acts of sex, and where ejaculation, et cetera, is shown, that is what we have been concentrating on. It has been in our minds easier to prosecute.

Q. May I ask you this: To go back to the written guidelines. Are the written guidelines still in existence?

A. They're still in existence, I imagine. Whether they are controlling or not, I don't really think so.

I have never required them of the police. They are mentioned in our search warrants as obscene per our guidelines, but they don't tell the police which things to take and which things not to take.

Q. Could you describe those guidelines; is it put out in booklet form? Is it just written memorandum, and how many pages?

Could you tell us something about it?

A. Frankly, no. I never — I don't have a copy of the guidelines. The officers could probably tell you what they are.

I have never used them. I've never seen them as a matter of fact.

When I came in, I told them what I thought they should do, and basically I told them to use their own discretion and find what you think is more explicit, if possible; and we'll just ride on my determination and judgment.

Q. But you have never seen these written guidelines?

A. Never.

Q. Oh, I see.

Let me ask you then about your guidelines when you took over and began guiding the prosecution.

What were the guidelines that you fixed?

Bruce A. Taylor by Mr. Fahringer

A. Okay. I told them that for most purposes find, if you go into the premises, and you're going to seize or buy something, find whatever you think is most explicit of the material available. They had been doing this.

Basically, those had been — my guidelines had been as vague as that. To use their discretion to find, you know, whatever is more explicit against that which is less explicit.

Q. What did you mean by "explicit"? We ought to have that on the record.

A. Explicit meaning actual photographs of penetration where it is clearly shown and not just in position.

Q. For instance, and you are talking about — I know this requires some delicate language. Like when the penis is inserted in the vagina would be when you're talking about penetration—

A. Yes.

Q. —that's what you're talking about. Sexual — if it were cunnilingus or fellatio you would want actual contact. The penis in the mouth or vice versa?

A. If possible, that's true; and by "explicit," the more close up the view — maybe, sometimes the more bizarre the subject matter, animals with them or beasts—

Q. Bestiality?

A. Bestiality, and masochism, bondage and sadomasochism. That type of thing.

A. Now, if there were pictures in terms of some of these — what sometimes is referred to as deviant sexual activity.

If it involved sadomasochism. If there were people just dressed up in uniforms or leather clothes or what-not and there was no activity, would that fall within — would you give them any further specifications on that sort of—

A. They have never brought in anything having to do with

bondage or discipline that didn't have actual sexual conduct clearly shown. That was because, at the time, that was all that was available so they seized the others—

Q. Now, in terms of going back to the sex what I referred to as the heterosexual conduct.

In that category, did you, at anytime, make a judgment in your office that as far as just books are concerned — that is to say the printed word, stories about sex, that describe sex, that they would not be prosecuted?

A. No. As far as I know, the police have never seized, and we have never prosecuted a case that was just words.

We never — just like a book like the Tropic of Cancer, unillustrated, et cetera. Although, the police have never been told not to, there have been a few times I have told them that if you couldn't buy a magazine, or they spotted you as a police officer and you didn't think they would sell you one regular type of magazine, or let you in to see a film, they might sell you one of the other books because they think you don't prosecute those. I told them a couple of times that if you have the opportunity, and that's the only thing you can pick up, if you want to take that—

Q. Could I ask you, and I don't mean to pressure you, Mr. Taylor. You talked about five hundred and some arrests or prosecutions in one of these periods. I don't have the figure committed to memory—

A. Since April '73.

Q. Since April '73.

You have had no, as I understand it, you have had no prosecution of any just paperback book or unillustrated book that dealt only with words. Is there any explanation other than the one you can give us for that; I take it there was some kind of custom that was told to the police that they weren't going to prosecute these books?

Bruce A. Taylor by Mr. Fahringer

A. They had been — I don't know what decisions the prosecutor before me made. For the past two years, my chief prosecutor has pretty much left it to my discretion, and I pretty much have left it up to the police to bring the evidence to me.

I'm not sure if I had any books before—

Q. Yes.

A. —they had several different kinds of cases before two years ago when I took over that we don't do anymore.

Q. Like what kind?

A. The chief prosecutor used to take part and go in to view things, and I don't. They went after Deep Throat as a movie, and tried civil injunctions and several things. We don't do as much as — we concentrate more or less on criminal action.

So I'm not sure if he had books or not. I couldn't — I'm not sure.

Q. But under your regime, you haven't prosecuted any paperback books at all?

A. None.

Q. Is there a reason for that?

A. None except as far as what type of material is more available in the adult bookstores. There is so much available which has, you know, very explicit photographs in them. We thought those would be much easier to present to a jury. That is visual stimuli rather than the written word.

Q. I assume — I know you are using the common vernacular here, but I assume your judgment somewhere along the line is based upon the law and your own feelings and judgments as to probability of success in prosecution. That's what you are saying, isn't it?

A. Right.

Bruce A. Taylor by Mr. Fahringer

Q. I take it that the procedure is when the officers go out exercising their discretion and purchase something, they bring it back to show it to you, don't they?

A. Well, not always. They buy it and bring it back. They'll describe it to me. Several times they have had the magazine with them. If you look at the cover, and a few pages, you can decide that this is one of the kinds we will do.

I don't routinely see the movies because they are described in the search warrant. I read the description which is really all the judges see too. So I very seldom see—

Q. Would you say in the case of the books, the magazines, that you see the majority of those?

A. I see the majority of them; although, as far as issuing warrants on magazines, the police officer brings those, you know, the completed complaint signed by the judge to the prosecutor's office; and most of the time I'm not there. Any prosecutor signs them. I'm not the only prosecutor that determines probable cause. After they get issued, then I take the case.

Q. I see. Let me ask you this: I take it that there is a class of case where they bring the material to you and say, "We bought this at such and such a bookstore," or "We think it meets the guidelines and ought to be prosecuted"; and they show it to you.

Does that happen?

A. Yes, that happens.

Now, most of the time, as a matter of routine, they'll come up with one of these books that are pretty much the same as all the rest of the books. On the cover, you know, there is an explicit or crass title where, you know, it's kind of vague, "bust and broad," or "orgasm" or "encyclopedia of deviant sex." They're pretty much the same. So when I see one of those magazines

that we have had contact with in the past, I issue the warrant. We don't actually go through—

Q. Page by page. All right.

Are there some magazines that you do go through page by page; is there another category you may have to examine a little more deeply?

A. There were — we had one magazine, or one set of magazines, that did not show any actual sexual contact, and didn't have any intercourse. That magazine we had to take a harder look at than most because of that fact. It merely had pictures of nude children, and since it didn't have any sexual activity — only in one instance, one of the magazines — we had two magazines. One magazine had one instance where the little girl had her finger on her genitals, but that one time, we had to look through the magazine to make a determination, and we did prosecute on that magazine.

Q. Well, what was the outcome of this prosecution?

A. We — none of those went to trial. They — as soon as we made the arrests, we made arrests in several different stores; and at the same time, we issued search warrants for the magazines. They took them all out of Cleveland, all of the adult bookstores; and this magazine disappeared. As far as the children in them, we dismissed all the prosecutions before they really got started.

Q. I see. All right. Can I ask you this, because I am interested in the guidelines. I think that goes to the heart of the hearing.

In terms of guidelines, have you ever examined — you mentioned as an example "encyclopedia of deviant sex."

In your guidelines, do you ever concern yourself with the articles or the stories or if it really is an "encyclopedia of deviant

sex"; and, if it is medically oriented or if it contains or has, what we used to call, redeeming social values?

A. Several of the magazines have commentary to go with them like the "encyclopedia of deviant sex." We have had that magazine several times. We had convictions with it so when we find it, we prosecute it again.

They do have commentary, but when I read the commentary, and when the police read the commentary, they also have the opinion that this, you know, I don't think this was a serious attempt at education. It was merely kind of a gross or crass, you know, blow-by-blow description to keep the pictures somehow legal or something. It didn't seem to be a redeeming magazine to me. There was base language, and it just talked about, you know, if you have problems in your marriage maybe it will help you and there were further pictures—

THE COURT: Mr. Taylor, I know that our reporter is very excellent, but he only has ten fingers.

MR. FAHRINGER: Mr. Taylor, slow down a little bit.

THE COURT: Slow down, Mr. Taylor.

BY MR. FAHRINGER:

Q. I'm sorry. You were saying?

A. Okay. Just when I read the story or things mentioned, as far as medical purposes, if you are having marital problems maybe or difficulties the answers or something for that, they would have a paragraph talking about the problem. They would have several pictures of people engaged in intercourse. I don't think that had any serious value. So the magazine we examined, the written word, didn't seem to change our opinion of the pictures.

Bruce A. Taylor by Mr. Fahringer

Q. Would you make a judgment as to whether or not the commentary, the printed commentary, was in good faith, or just superficial?

A. Well, as far as good faith, I thought that, you know, the ones I had seen weren't in good faith. This meaning that they were just — that the book was just published for the purpose of showing the pictures rather than giving you a commentary. So for that reason, it wasn't in good faith.

Q. I take it then, on that basis you said "Go ahead with the prosecution"; you okayed it?

A. Right.

Q. Now, how is that normally done; how, ordinarily, would you approve the prosecution?

Is that orally; would you just simply say, "I agree with you. I think this suits the guidelines and go ahead and proceed to get a warrant"?

A. Yes. Usually the police officers would just come in with a warrant for the magazine, you know, and you just look at it briefly and sign the complaint and they do it their way.

Q. Let me ask you this: Do you sign the complaint?

A. I sign several of them. All the other prosecutors sign them too.

Q. Let me ask you this: In terms of your specialty, if the others — I take it there were prosecutors who would sign them. I think of you as the man primarily concerned with the obscenity prosecutions, and I take it there was no set procedure where you would examine most of the materials that were purchased to determine whether or not a prosecution should be inaugurated?

A. No, whichever prosecutor was available would sign the complaint and the search warrant.

Q. Now, were there any written records kept of this where you would say "I'm rejecting this publication because I don't think it meets the guidelines," and then a report would be made of that?

A. There would have been a report kept had that ever been done. Police obviously have to make reports on every transaction where they make a buy or purchase; but there's never been a time when a police officer seized a film, or bought a magazine, that I didn't issue on. Also they have described different magazines to me that I told them not to bother with, but those, since they never bothered, we never got on the subject of a report. There probably wouldn't be.

Q. So that in terms — the date I keep in mind, April 1973, from that time on, there was never a situation where they purchased anything that you rejected?

A. Not that I can think of.

Q. Okay. With the exception of the one incident that you described to us about some children's book, that there was no sexual activity, I take it that all of the cases that you saw and prosecuted and were brought into the office, did involve some explicit sex?

A. Most of them did, yes.

Q. Can you think of any, other than the ones you told us, that didn't?

A. Some of whom we had gone to trial with had pictures of women — weren't bisexual magazines. It wasn't two women or there wasn't a man and a woman. There was some just with pictures of one woman engaged in what appeared to be masturbation, et cetera, and just exhibiting her genitals.

Q. That, of course, would be sexual activity; but, masturbation with just one person involved?

A. Yes, but without like penetration or things like that.

Q. In other words, the masturbation was not explicit?

A. Wasn't as explicit, right.

Q. Now, were those cases successfully prosecuted?

A. Yes.

Q. All right. You mean you got a conviction on a magazine with just a woman appearing to masturbate?

A. Yes, we had last year, 1976, we had about 18 trials. Two trials were dismissed on the — by the judge on a motion to acquit. One jury verdict was not guilty on a magazine; and all other 15 were guilty.

We really had only one jury out of 16 that ever came back with a not guilty verdict. When we asked them later they said it wasn't based on the obscenity of the magazine, but on the proof of—

Q. Knowledge.

What I'm interested in is on the situation with the magazine that you described that just had a woman who was engaged in what appeared to be masturbation.

Do you know, specifically, whether or not there was a conviction on that magazine by a jury?

A. I can't remember.

Q. Okay. Now, in terms of that category of material other than what we normally think of as hard-core pornography, where there is explicit pictures of penetration of men and women, men and men, women and men or what-have-you, what portion of the prosecutions involved just that category of what you described; a single person appearing to masturbate?

A. Probably a small percentage. Most of the cases, probably nearer to — maybe 90 percent involved explicit intercourse and penetration.

Q. Now, I don't mean to pressure you on this, but would it be fair to say once you began your part in prosecuting the cases, virtually all of them involved explicit sex of one sort or another?

A. Yes.

Q. Okay. Now again, when we're talking about explicit sex, we're talking about either heterosexual activity or other forms of sexual activity whether it's actual penetration, or actual photographs of sexual behavior?

A. Yes.

Q. All right. Now, you indicated there were times when the officers described some publications to you, and that they would come back and apparently what the procedure would be they would say "Well, we saw some books at such and such a bookstore," and you indicated to them "I don't think you ought to bother with them."

Can you describe the type of material that was?

A. They had made a few arrests on magazines, newspaper-type magazines called "Screw" and several others. They had the same format as newspapers — not magazines — with newspaper pictures rather than glossy pictures.

Some of those they had made arrests on, and they said they also got them here and there at different newsstands, and I believe I told them not to bother because we already — we had one file on Screw newspapers, and I think—

Q. What happened in that case?

A. I'm pretty sure there was a conviction.

Q. Okay.

A. And we had some that we — several of those were brought up when the former sergeant of the unit, Sergeant Schmidt was on duty. He purchased several of the Screw newspapers. He has since left the department for health reasons, and most of those cases we had to drop. We never really got to do very much in this area only because he left the department.

Q. Now, was your reason for not pursuing -- because I understand, Mr. Taylor, and I don't mean to put words in your mouth, the standards are constantly changing and I take it, somewhat, the attitudes of the prosecutor as to what should be prosecuted and what shouldn't. I'd like to know, more specifically, in terms of your more recent judgment that a magazine or newspaper like Screw should not be prosecuted, what is the actual basis for not prosecuting; is it on the basis of your view that that material is protected, or is it on the basis that you already got a conviction sometime ago?

A. Mainly that we had made so many arrests, and several cases still pending; although, they have not been told not to buy that magazine for the purpose of prosecution. They still probably will in the future because they purchased not only Screw, but there are a couple of others namely Smut, which is the title of another newspaper tabloid; and there are several that are now pending. Most of the time, when I go into the stores, there are several magazines with pictures on the covers, and for knowledge purposes it makes it easier, usually, to go with the others.

Q. I might ask you this: On the Screw conviction, was that sustained on appeal?

A. We haven't had any sustained on appeal.

Q. You mean all the convictions have been reversed?

A. All of them reversed at least since I have been here. There

have been about — all of last year's are still on appeal. Since I have taken over, we haven't had any case come up—

THE COURT: Mr. Taylor, what you mean is that all of them went to the Court of Appeals, and the Court of Appeals has made a decision to reverse. Not all of the convictions have been reversed.

THE WITNESS: Right.

All the trials that ended up guilty verdicts went to the Court of Appeals and were reversed. None were reversed on the issue of obscenity. All were defects in the charging or complaint.

BY MR. FAHRINGER:

Q. What we normally think of as procedure?

A. Procedure. Although we have never, since I have taken over, renovated the procedure, those have not been tested. Yes, they're all pending.

Q. Do you mind if I ask you how many convictions are now pending on appeal where there hasn't been a disposition?

A. I think there are 15 or 16 trials, maybe even 17 jury trials that are on appeal; and there are, I think, six or seven motions to dismiss and motions to suppress that I appealed and asked the Court of Appeals for. There are about 20 cases now pending.

Q. All right. Now, just a few more questions then I intend to be more specific.

In terms of the prosecutions, and the guideline, what I think about in terms of the category of guideline, have you ever had a magazine or publication described to you, and you described one incident that I asked you about, Screw magazine, but have you ever had a magazine or publication described to you that you declined to prosecute because you thought it had some, for

want of a better term I'll use the old label, redeeming social value, or literary, or artistic, or political or scientific value?

A. No. Mainly because the police officers brought me material that I didn't differ with their opinion.

Q. Now, you use from time to time the term "hard-core pornography," don't you?

A. Yes.

Q. And that is, if it is the same as mine, that is the explicit pictures of sex where you're talking about penetration, and so on and so forth?

A. That's the street definition. That's the one people generally know. That's not the definition that I think the Supreme Court thinks about.

Q. Incidentally, I meant to ask you about that. When you took office, and began participating in prosecutions, you mentioned the Miller test and only hard-core pornography was to be prosecuted but in terms of the Supreme Court definition of it, right?

A. Right.

Q. And did that influence you in the judgments that you made on the hard-core pornography aspect?

A. Well, I didn't really have to because I think we had been prosecuting material which would have been obscene under any definition of "hard-core" before and after Miller. At least, I never got into the case until after Miller.

From what I saw, they were also what I would think the courts meant when they said "hard-core"; and even when we prosecuted the magazine with the little children in it — little girls, eight, nine, ten-year-old girls — I thought that was hard-core pornography even though it didn't have any sex because

the way I read the Miller test which said lewd exhibition of the genitals, and I read the Paris art case—

Q. Now, in terms of the material that would be excluded by Miller, can you give me any examples of what you might consider not hard-core pornography in the field of sexual material?

A. I imagine — I'm not sure I ever looked at every page of Joy of Sex. I imagine the Joy of Sex may not be hard-core even though the drawings are explicit. From what I know of the publication, the commentary — well, that would be literary — scientific — There are drawings that accompany it that I would think would redeem it, and so that the pictures were put there for a purpose rather than for exploitation or for reading hard-core—

Q. I understand that. That's a little different than the question I asked you.

I appreciate you could have hard-core pictures. That is to say actual penetrations that are salvaged, as it were, by reasons of — you know, it is a medical book. But let me ask you this: Can you think of any photographs of people, men and women, that would be sexually oriented, and would not be hard-core?

A. There probably could be. Now, when you say sexually oriented—

Q. There's—

A. —magazines like nudist magazines which I know have been held by the Supreme Court not to be obscene. Certainly those have nude persons in those. They don't have sex in them. They obviously can't be hard-core.

Q. What about magazines that just consist of women in the nude with their genitals fully exposed, could you conceive of a situation where that wouldn't be hard-core, or do you think everything is hard-core?

A. No. I think that you have to judge mere non-sexual nudity as — if it is not lewd exhibition of the genitals, and then it can't be hard-core.

There was an opinion of a Common Pleas judge in Ohio back in the late '60's which describes a magazine that had pictures of a woman, you know, bending over spreading her legs. It's one thing to stand up in the nude, and show a full frontal nudity, and another thing to spread your legs. Because then you can tell by looking at the picture what her intent was by being in that position which means to show the genitals. I always read hard-core exhibition of the genitals as meaning focal or prominent, obviously—

Q. Is that your standard on that—

A. Yes, that's my—

Q. In other words, your definition of lewd display of the genitals is what?

A. Those descriptions or depictions that bring the genitals into obvious focal or prominent view.

Q. Now, nevertheless, in the last two years, I am correct in your prosecution — the history of your prosecution, you have always prosecuted actual hard-core pornography in terms of sexual penetration and explicit pictures of men and women having sex of various kinds, isn't that true?

A. That's pretty much true. We only ventured into what we call "soft" — what would be street language — "soft-core" a few times.

Q. Now, what is your definition of "soft-core"; we better get that straightened—

A. There is no legal definition of "soft-core" I don't think.

The street definition of soft-core could be pictures which show nude people maybe in a simulated position of intercourse.

Bruce A. Taylor by Mr. Fahringer

Where you can't see the genitals, or a picture of people having intercourse where it is so dark or smoky that you can't quite see. Then you have medium-core pornography which would be maybe a woman holding a man's penis or, you know, fondling a breast. Not actually showing any intercourse. Like The Last Tango in Paris, you could see them actually engaged in the motions which would be intercourse, but you couldn't actually tell the actors' — whether they were really doing it or not.

When something is hard-core on the street, you can tell that the actors are actually engaged in intercourse. Medium-core, you couldn't swear what they were doing or—

Q. By way of an example, a man could be lying between a woman's legs in such a position you couldn't tell whether or not his penis was inserted in her vagina, as an example, but it gives you the impression they are having intercourse. The difference between that is a close-up of the penis actually inserted in the vagina, by contrast.

In your mind, the one would be hard-core, that is the actual explicit picture of the penis inserted in the vagina, and the other would be soft-core because you couldn't tell whether it was?

A. That's according to the street definition.

I read the Supreme Court definition when Miller said actual or simulated, I thought that included simulated and hard-core. Therefore, the medium-hard-core definition were kind of mended into one, and you define hard-core as being not only pictures and what they show, but their effects as far as prurient interest and serious values—

Q. Now, nevertheless, if I understand your testimony correctly, going now to soft-core, that when you took over in April of 1973, this office, you didn't prosecute any soft-core?

A. And I still don't — I never seen anything that we prosecuted even until today that I would call soft-core in street language.

Bruce A. Taylor by Mr. Fahringer

Q. So that soft-core hasn't been prosecuted?

A. It's been what people would call medium-core to hard-core.

Q. Yes. Okay. Right.

Now, before I leave this, I wanted to just ask you again, in terms of nudity. Is there anything else, in the field of nudity, that you would not consider hard-core under Miller's definition. I want to talk now strictly about the legal definition?

A. Yes. I think there is. Had the pictures of the little girls in those magazines not been of little girls, and had they been with maybe pictures of this with adults like they are in nudist magazines — this magazine showed little girls and little boys together, and that's all. I think these would be hard-core because of the way they were set up. It would be soft-core and not obscene at all if they hadn't been focused just on little kids without any clothes on, and if it were in a different setting, that type of situation.

Certain magazines that show and certain films that show nudes, I don't think constitute obscenity and hard-core. Well, like the Godfather. It had pictures of breasts and you could see pubic hairs. I don't consider that obscene.

Q. Now, I wanted to ask you in terms of adults, and I don't mean to get back to the young people, but in terms of adults, and again, talking nudity. I think it would be smart to talk about women because they appear more in these magazines than men.

As far as the women are concerned, do you consider the fact, merely because pubic hairs are shown, that that meets the hard-core definition of Miller?

A. No.

Q. All right. And do you consider merely because the — and I want you to listen carefully to my question because I'm really

interested in your definition. I'm talking only because, and all other factors aside, only because the vagina is in some way exposed more fully, that is to say where you might be able to see more than just pubic hair in the vulva or into the really internal parts of the vagina do you consider that, in and of itself, hard-core just by itself?

A. It can be. It only depends on how it is portrayed. I think you have to judge hard-core not just on the pictures, but on the other two tests, prurient interest—

Q. Yes, and—

A. —and I have been very strict in telling the police, and in my own decision, that the pictures alone have to be read by the whole content of the book; and the pictures in one — the same figure in one book may not be obscene when it is in another book.

Q. Now, in that context, Mr. Taylor, where you're dealing only with nudity and there is no suggestion of sexual activity of any kind, but just girls' pictures in full frontal nudity with perhaps the genitals fully exposed, do you give any consideration — or would you give any consideration to the balance of the magazine, the articles or the stories—

A. Well, certainly the articles that were included within that portfolio and the pictures would be considered. In any magazine, you have to judge the rest of the magazine also. Certainly, if you had a magazine that had just one obscene section, and the rest of the 500 pages, or whatever it was, had nothing to do with sex, you might not be able to find the whole magazine obscene. As long as the sexual issue or part had something to do with the purpose of the rest of the book, the rest of the book certainly has a bearing on the book.

Q. I take it then that you would consider the balance of the book?

A. Certainly.

Q. Now, let me ask you this: Very quickly. Have you ever prosecuted, and up until this time, I'll see if I'm correct, in terms of just frontal nudity and the exposure of the genitals, I take it, you have never in your five hundred and some cases you have talked about, you have never prosecuted a case that involved just that; other than the situation you talked about with the children?

A. Well, Screw magazine is like that. It didn't have any actual penetration. The one we saw, Smut magazine, although it did have a girl sitting at a typewriter with no shirt on, and girls with genitals exposed and a commentary to that magazine, that magazine has no sexual activity that I know of. Not the one that I saw; but we did prosecute it.

Q. The one we defended in Wichita, going back two years, certainly did.

I don't know — I'd like — because I appreciate you giving us your best recollection, but are you saying the ones that you examined, the issues of Screw and Smut, didn't have explicit sex?

A. The ones that I remember — I don't look at them in that detail that I would remember everything in them.

I remember the magazine and the newspapers not having explicit sex shown.

Q. How long ago was that?

A. Last summer. Maybe, last spring.

Q. Well, you know, it's not my position to quarrel with you. I must indicate though that the ones that we have seen have pretty much explicit sex, but that's—

A. That's—

Bruce A. Taylor by Mr. Fahringer

Q. —your recollection is what we're investigating here.

Now, let me ask you, and I have been a long time getting here so forgive me.

When the Hustler magazine was first brought to your attention, as I understand from your brief and some of the statements you made in court the last time, a complaint was made about two incidents. One was a cartoon involving Mrs. Ford, and I believe this cartoon involved a mastectomy. Did I misunderstand, or was there also a cartoon involving the Statue of Liberty?

A. No, there was only one cartoon in the July issue having to do with the Statue of Liberty, and Mr. Ford, Kissinger and Rockefeller. I don't even remember anything about Mrs. Ford.

Q. All right. Let me take that first. In that episode, as I understand it, a complaint was made because of that cartoon involving three political figures apparently engaging in sex with the Statue of Liberty?

A. Yes.

Q. Is that what prompted you, and I'm only talking about what prompted you, to investigate the magazine?

A. No. Because by the time it came to me, that was all done.

Q. I'm sorry. What did you mean by that?

A. As I understand it from the police officers, someone sent a copy of the July issue to Captain Delau. He's the direct supervisor to the unit. There's the sergeant and then Captain Delau.

Apparently, someone sent the magazine to him, and he got a few phone calls about the cartoon in the July issue saying, "Look what they're doing to our president," et cetera.

Then Captain Delau turned the magazine over to the officers in the smut squad and asked them if they could submit it for a

determination from me and the judge if they could make a case out of it.

When it came to me, the officers had already gone out and found if it was selling and what Hustler magazine was and—

Q. I understand that. You're still the one that was being consulted as to whether or not it should be prosecuted?

A. Right.

Q. And I take it, in terms of it being brought to your attention, it was primarily brought to your attention because of that cartoon?

A. That's the reason the police got it.

Q. All right.

A. Apparently.

Q. All right. Now, the magazine has come to you, and you are — incidentally, can I ask you in terms of a complaint. Were these written complaints or complaint?

A. The magazine was mailed anonymously to the police department as far as I know. The phone calls they were just from people that called up and they keep a little, you know, a little note—

Q. A record is kept?

A. Just, usually, what time the thing came in, and sometimes — I don't even know if they keep those.

Usually, they say "yes, we've got six or eight in one day" on this little scratch pad.

Q. Do you know how many complaints were made in connection with Hustler?

A. No.

Bruce A. Taylor by Mr. Fahringer

Q. Did you investigate at all the number of complaints.?

A. No.

Q. Do you know, just in terms of your recollection, whether it was more than a half-dozen or what it was, 12 or what?

A. The officer described it as "We got a few or several complaints" — I don't know, exactly. Steve Nemeckay—

Q. Is he the one that would know about that?

A. Probably.

Q. Okay. Now, you then examined the magazine, is that correct?

A. Yes.

Q. All right. Now, at that point, if I understand correctly, you had never prosecuted a magazine with just full frontal nudity or with genitals fully exposed, right?

A. The only one I remember is the Screw magazines, and we had some films that had just one girl masturbating herself without inserting her finger into her vagina.

Q. But leaving pretty clear the impression that she was masturbating?

A. Masturbating, sure.

Q. And that was one film.

A. Oh, we have had several like that that I can remember. They're on appeal now. I imagine that will be decided.

Q. But the great bulk of your work was explicit sex, and as you indicated awhile ago, it was hard-core?

A. Certainly that was the first one we went after that was nationally distributed, and was a second class mailing privilege type magazine.

Bruce A. Taylor by Mr. Fahringer

Q. Now, incidentally, you have never prosecuted any magazine — I'm talking about magazines now, based upon their cartoons, had you?

A. Not that I know of; although they're talking about prosecuting the cartoon of Fritz the Cat.

Q. But that was all cartoon?

A. All cartoon.

Q. With explicit sex in it, or simulated—

A. Apparently. I didn't see it. Apparently it never was shown in Cleveland.

Q. You had never prosecuted a magazine other than that episode strictly on cartoons?

A. Not that I can remember.

Q. All right. Now, you had never prosecuted a magazine that contained just printed material either, had you?

A. Not that I can remember; although they did have one for just cartoons, but that was a prosecution involving the sale of—

Q. A minor. It wasn't to an adult?

A. No.

Q. Now, you examined the magazine, I take it?

A. Hustler?

Q. Yes.

A. Yes.

Q. I'm taking you back now to when they brought the magazine to you, and you had to make a judgment as to whether or not a prosecution should go forward?

A. Yes.

Q. And I take it — did you examine the cartoon, the political cartoon?

A. Yes. Briefly though.

Q. Now, incidentally, may I ask you this question, Mr. Taylor: I'm advised that you have appeared on television and you have spoken publicly on this subject. Did you make a statement on one of the television shows that the reason that the magazine was brought to your attention, and the reason that the prosecution was launched was because of this political cartoon?

A. On the Channel 8 interview that I did, they asked me is this what brought it to their attention, and I tried to clarify that that is what started the police officers noticing that magazine; and I did admit "yes," somebody had made complaints about this cartoon, but that's not the reason we prosecuted.

Q. Well, have you seen a transcript of that — this interview at all?

A. No.

Q. Do you recall, and I only ask you if you recall, indicating that that was one of the reasons the magazine was prosecuted?

A. No, I think — I mean, the way I remember it, and I told them ahead of time what I meant because they had told me what questions they were going to ask.

Q. I'm only, incidentally, asking what actually you said on the air?

A. I told them the reason the magazine was prosecuted — one of the reasons was because of the complaints that were received on this cartoon.

Q. I see.

A. That certainly has nothing to do with why this magazine was prosecuted.

Q. Again, I'm not trying to be cute with you, but the point of it is that you did indicate, at least publicly, that one of the reasons this magazine was prosecuted was because of the cartoons?

A. One of the reasons that they were prosecuted, but not one of the reasons they were charged. I think there is a difference.

I didn't base the cartoon as part of the charge. As a matter of fact I told the police—

Q. I'm not saying that—

A. I told the police that the cartoon was the most protected thing in the whole magazine.

Q. But the fact of the matter is that the investigation started based upon the cartoon?

A. Because of the cartoon, yes.

Q. And you indicated at one point, publicly, that one of the reasons it was prosecuted was because of the cartoon, as I understand it?

A. I don't remember.

Q. All right. Now, what you are indicating is that there was other reasons too, right?

A. Well, I think the magazine was prosecuted and charged in spite of the cartoon rather than because of it. Like I said, I told the police that it was the only thing in the magazine that would be the most protected form of expression contained in it.

Q. Was any report made in terms of a decision to prosecute? I'm talking about the July 1976 issue of Hustler. Was there any written report made up as to the basis for prosecuting this magazine?

A. By me, no.

By the officers. They all made out duty reports, and described where they went and what they found in the magazine. I think—

Q. Would that contain any information why the magazine was prosecuted?

A. It might.

Q. Okay.

A. It might indicate that there was some part of the magazine that the officers singled out as being, you know, noteworthy or something—

Q. Let me ask you this: Who would have those reports; would that be Mr.—

A. Steve Nemeckay.

Q. All right. Now, going to the July 1976 issue of Hustler, let me — just bear with me for a moment.

Do you happen to recall the page that the cartoon is on; I thought we ought to identify it.

A. Probably in the middle, I assume, because there was a two-page spread.

Q. All right. I'm showing you — should I have this marked—

A. I'd rather you didn't. That's the police officers—

Q. I won't mark it if we can just identify it.

This is the July 1976 issue of Hustler that bears an inscription on it that appears to—

A. That's the officer's initials and date of purchase.

Q. All right.

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A. Nemeckay, Badge 1577, and dated 7/2/76, 10:30 A.M., at 1834 East Sixth Street, and then that's the other officer's — John McNamar's name, and number and same date.

Q. Using that issue that will be deemed — we might, Your Honor, may we just say deemed marked Defendant's Exhibit A, deemed marked A.

I turn to what would be page 86, I believe. Let me make sure of the page. Eighty-six and 87, and is that the cartoon that the complaint was made about?

A. Yes. Apparently that's it.

Q. All right. Now, while you have the issue there, when you examined it I wonder if you might tell us what other portions of the magazine you relied upon as being hard-core pornography under the Miller definition to initiate the prosecution?

A. Okay. Now, as you know, the main part of that Miller test is does the work, taken as a whole, appear to prurient interests and lack serious value. And the second test, does it contain actions as defined by law, State law.

The magazine has numerous pictures of women with their genitals prominently exposed, et cetera, which is not uncommon in many magazines. There are, not as far as I can see, actual scenes of penetration other than simulated ones, and I didn't read all the stories or all the letters, but several of them have to do with sex which in my opinion didn't seem to be educational or scientific. There are several pictures of men with their penises out — and hanging out, et cetera, which appears to be just pictures just showing that, and no other purpose.

Q. Well, what my inquiry is — first of all, let me ask you this: By the process of elimination were there any stories that you can see in the publication that you relied upon, just the

printed word, as being, in your judgment, hard-core pornography?

A. Almost all of them.

Q. All of the stories, or all of the articles?

A. Almost all of them. There is an interview with Althea Leasure there that didn't seem to be sex-oriented, really.

There is a — there is one story, I don't know the name of it, it's hard to tell. It starts on page 29. That seems to be, you know, a story about people which describes sexual activities.

Q. Well, are you saying because the story describes sexual activity, you felt it was hard-core under the Miller test?

A. In this case, yes.

Q. All right. Let me ask you this: Did you read all the stories in the magazine at the time?

A. I haven't read the magazine cover-to-cover.

Q. Before you would authorize the issuing of a complaint, did you read all the stories?

A. Not every single word.

Q. Which stories did you read?

A. I looked at — I panned through and looked at all the pages.

Q. Let me ask you this—

A. I examined the stories more than read them.

Q. When you say you examined them, what did that mean?

A. You know, reading a paragraph here and there. That is bold letter captions — certain parts where they get more explicit than other parts. I skipped over the parts where they're walking and talking.

Bruce A. Taylor by Mr. Fahringer

Q. And you made the judgment, Mr. Taylor, you made the judgment on the articles on a spot reading?

A. Well, on a one-time reading. I only examined the book once before the warrant was issued, as a matter of fact.

Q. How much time was spent examining it, to your best estimate?

A. Oh, maybe 20 minutes.

Q. Okay—

A. Maybe less than a half-hour.

Q. Okay.

A. There was a lot of discussion, and only 15, 20 minutes of actually examining the magazine.

Q. Could I just take the magazine and look at it with you going through it? Did you read the publisher's statement?

A. Yes, I have read that.

Q. That wouldn't be the basis of prosecuting the magazine?

A. No one thing is.

Q. Well, did that enter into your consideration at all, the publisher's statement?

A. Not really.

Q. What about the feedback letters to the editor?

A. It may — although the editor's statements does say something about the general tone of the magazine, the purpose. So I read it, and I didn't rule it out.

Q. On the day that you examined the publication, the 20 minutes you were able to spend just going through the magazine, did you read the letters to the editor?

A. I read some, but not all.

Q. Do you remember which ones you read?

A. No, I skipped around and looked—

Q. Did any of the letters form the basis of your opinion for prosecuting the magazine?

A. Not alone, but—

Q. But did they, in part?

A. Just the fact that they were there, and what kinds of — well, what kinds of content the letters spoke to. I mean, all the letters pretty much were talking about the same things, and had some bearing on my decision.

Q. Let me understand, you didn't read all the letters?

A. Not all of them.

Q. Okay. You weren't able to, on that occasion, to tell what all the letters said?

A. Not all of them, you know, most. The ones that I read were maybe — I read all — maybe half of the letters, and I looked at a few sentences of some, and maybe half of the rest.

Q. Okay. How about the advise and consent. Did you read any of the advise and consent?

A. Yes, some.

Q. How much of that would you say you read?

A. Maybe a third.

Q. A third of it?

A. I imagine, yes—

THE COURT: Mr. Taylor, I can't hear you.

THE WITNESS: Maybe a third, Your Honor.

BY MR. FAHRINGER:

Q. Did the advise and consent play a part in the prosecution of the magazine?

A. Yes.

Q. In what way?

A. When I felt that the types of questions and answers that were picked by the magazine to make an issue to answer, and which ones they felt should be in the magazine. I felt that was part of the tone for the whole magazine. I was trying to find a common part throughout the magazine that I could pin as taking it as a whole.

Q. Do you remember, specifically, reading any part of advise and consent that stands out in your mind?

A. Just that I — I can't remember today, you know, like any particular fact situation. But I remember most of them had to do with a lot of questions about what do I do with certain kinds of girls. I have a story I'd like to tell you, and the stories seemed kind of far-fetched to me.

Q. Okay. What about bits and pieces, did you read any of that?

A. Yes. There are several pictures in there and a little commentary that goes with the pictures. I really looked at quite a bit of that.

Q. Did you feel as though that contributed at all to your decisions for prosecution?

A. Oh, certainly, yes.

Q. Why is that?

A. Because most of—

Q. What about — I'm sorry. I didn't mean to interrupt you.

Bruce A. Taylor by Mr. Fahringer

What about asshole of the month. Did you feel that should be a part of your judgment to prosecute because it contains the prosecutor, Mr. Larry Parrish?

A. As a matter of fact, I didn't know who Larry Parrish was when I read that first Hustler. That was the first time I had ever saw what they called asshole of the month. That again is probably what I would feel was one of the things that, in spite of its existence, you know, and led us to go after the magazine, that probably was the most protected thing they can say—

Q. What about, what sort of man that reads Hustler, the description of the type of man, that guy in the bar, working man, did that play a part in your judgment?

A. Not so much, no.

Q. All right. Now, how about the picture of Uncle Sam or at least a man who purports to be, and a song which is in rhyme and is sort of styled after the Star Spangled Banner, did that contribute at all to your decision?

A. Yes, because it seemed that — yes, because of the orientation towards sex that it had.

Q. You mean the orientation that merely his pants are down?

A. Yes.

Q. And his penis is exposed?

A. Yes.

Q. And that was it. That was the basis of your judgment?

A. As far as that picture goes. Certainly, that can't be taken alone.

Q. Now, the rest of these — are there any of these — how many of these did you read, would you say?

A. I can't remember. Maybe a fourth, you know, of everything. I'm not even — maybe not that much.

Q. Now, going onto the next category, "Sex Play." Are you familiar with that feature that appears regularly in Playboy? Did you read "Sex Play"?

A. I'm kind of familiar with it now. I noticed it appeared in the August issue and again in the September issue. That's the three issues we had been dealing with.

Q. Did you read "Sex Play" in this issue?

A. Some of it. I looked to see what kind of article it was.

Q. How much of it did you read?

A. Maybe a fifth.

Q. All right. And did this article on sex between the couples, did that contribute in anyway to the prosecution?

A. Yes.

Q. In what way?

A. I thought it was a story which wasn't really to cure serious sexual habits. It was merely a story about people engaging in sex.

Q. Now, to that extent you are making a judgment of the good faith of the article?

A. I'm making a judgment on whether or not it appeals to certain types which I call prurient. That is my judgment — was at the time.

Q. In other words, if an article which purports to be one written in terms of sex and structure, or whatever you want to say, in terms of adjustment between a man and a woman, and men and women concerning their sex, if it is written in that light

and along that pattern, you make a judgment as to whether or not you think it would be appealing to an average person's prurient reading—

A. Reading prurient interest as a shameful or morbid interest.

Q. Well, is there anything shameful or morbid in this article?

A. I thought most of the article was morbid—

Q. No, I'm talking about "Sex Play." Is there anything in that article that you thought was morbid or shameful?

A. Yes, I got that — the way I interpreted the tone of the article.

Q. What part of it?

A. Because — the description of indiscriminate sex, and that's like all that was on their minds; and all, you know, they had time to do. It indicated that was the attitude that was trying to be portrayed by the magazine.

Q. That was based upon by reading one-fifth of the article?

A. Yes.

Q. Now, "Sex Play." That's the next category, and that appears to be news around the country of different events having to do with sex in news items.

Did you read those?

A. Not as much, I don't remember.

Q. So that wouldn't have entered into your consideration?

A. Well, I can't say it didn't.

Q. Well, if you hadn't read it, if you didn't read it?

A. I didn't read all of it, that's for sure.

Q. Well, did you read any part of it?

A. I remember reading part of that. I remember that I read certain little parts of everything, and greater parts of a lot of things, all of some, but not all of everything.

Q. Now, in terms of the first photo series that we have, "I've got a secret Janet."

Do you feel that that picture of a woman in the nude, as she is exposed there, do you believe that fits the definition of hard-core pornography as defined by the United States Supreme Court — that picture by itself?

A. I don't think the one picture by itself can. If the picture is in a book, you have to decide in relation to the rest of the book.

I can't pick out one picture and say that picture is obscene. Maybe alone it isn't obscene.

Q. Well, if you took this alone?

A. If you took that picture and stuck it in a frame and put it on the wall and asked, "Is that picture obscene?" I would say no.

Q. Now, what about the one with her pants; would you say the same about that, that by itself would not be?

A. That would be hard to say. Probably not.

Q. What about the next one then?

A. The next one I wouldn't rule that out. I might say that's obscene.

Q. And how about this one—

THE COURT: You said that is obscene or that isn't obscene?

THE WITNESS: I would say that probably is.

THE COURT: Probably is?

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q. What about the next one; so we know what you are talking about here, for the record, these pages are not all numbered.

I'm talking about the picture on page 27. The way she posed there, would you say that this picture by itself would meet the hard-core pornography—

A. It could.

Q. "It could." You're not saying it would?

A. No, I don't ever say that it does. I say it probably could.

Q. How about that picture, that would be on page 26? Would that—

A. That could.

Q. It could, all right.

Now, did you read the story, I guess—

A. "Gloria".

Q. "Gloria", Did you read that story?

A. Not all of it.

Q. How much of it?

A. Maybe a fifth, maybe a tenth.

Q. Do you remember what the story dealt with?

A. Just that it dealt with two people mostly.

Q. Do you remember whether it involved natural sex or unnatural sex?

A. The two people were engaged in all kinds of sex intercourse. Fellatio, cunnilingual, that's just about all it dealt with.

Q. How much of it did you read?

A. Well, maybe one page out of how many pages the article is. Maybe it would be like a fifth or—

Q. —that much appeared in that portion that you read?

A. Yes. It seemed like the whole stream of the article — that that was the whole stream. In reading the first couple of words, the sentence, the whole stream of the article dealt with that, and I don't think anything else.

Q. In terms of taking that article by itself, if that were published by itself, would you consider that to be prosecutable; just the story?

A. Yes.

Q. Why is that?

A. Because it deals with nothing but sex for its own sake, and meets all the tests.

Q. Now, as far as the cartoon on page 34, a woman in what appears to be a prison with the police officer sitting there, which would be a guard, "I'm here to make a conjugal visit, anyone would do."

Would you consider that hard-core pornography under the Miller test, by itself?

A. No. Not by itself.

Q. Now, the next photo series which starts at page 39 is "A day in the life of a gynecologist."

The first series of pictures is where a woman is undressing and is being examined by a doctor. Would you consider that hard-core pornography under the Miller test?

A. This first set—

Q. Yes. The two pages. There's one, two, three, four, five, six, seven pages.

A. Maybe those two pages would.

Q. By themselves. I only mean to take them by themselves. I intend to examine the magazine by itself. Would you consider that picture, by itself, hard-core pornography under the Miller test?

A. No.

Q. How about those that come in the next two pages where the doctor is making an examination?

A. Well, read within the whole portfolio, yes. Maybe it would depend on what would appear — certainly those same pictures would appear in a medical journal—

Q. And you wouldn't consider them obscene?

A. No.

Q. Now, the interviews with Althea Leasure, you didn't consider them to be hard-core pornography under the Miller test, did you?

A. No.

Q. We're moving along the series of photographs that include, well — "X-rated reviews of films." You wouldn't consider that hard-core pornography under the Miller?

A. Well, I think that had something — that obviously is one of those things which is consistent in the vein of the nature of making that book for the—

Q. But if it involves real reviews of movies, then you consider it obscene movies they review?

A. They do so in a way where I think it is not serious except that kind of attempts to be but—

Q. Well, if these were alone, would you prosecute them by themselves; if it were just a pamphlet?

Bruce A. Taylor by Mr. Fahringer

Would you prosecute that — the reviews of the films by themselves, taking your—

A. I might be able to do that like you prosecute a newspaper for advertising Deep Throat.

Q. Well, my question is quite frankly that if this came out by itself, these two pages, "X-rated reviews of films," and assuming they are genuine and legitimate films, would you, if the police officers brought it into you, would you be inclined to prosecute that?

A. Probably not.

Q. The same would apply to the books. If they just came in by themselves, the reviews of the books?

A. Probably not, again.

Q. Okay. Are there any cartoons in here that you recall, if they were standing by themselves, that you would consider it to be hard-core pornography under the Miller definition?

A. Oh, yes, a lot of them.

Q. Would you consider this one on page 61?

A. Yes.

Q. That you consider hard-core pornography?

A. Yes.

Q. Do you take into consideration at all, if this cartoon is to entertain or is to be humorous; do you make any distinction at all?

A. Well, just the practical one. Not really. As far as the cartoons are out, and only the pictures are in.

Q. Well, now, going to the next series of pictures of "Evelyn" which says "Pink is beautiful." Taking the first picture which

appears on page 62 and 63, that picture, by itself, would you consider that hard-core pornography under the Miller test?

A. No.

Q. What about the picture on the right which would be page 65, is that picture there—

A. Yes.

Q. You would consider that to be hard-core pornography under Miller?

A. Yes.

Q. Why?

A. Because the genitals are exposed and almost nothing else. You can see part of her breasts. It seems that's why they took the picture. The picture is of the girl's thigh and again not of the girl.

Q. Would you agree that is subjective judgment on your part?

A. Certainly.

Q. How about this picture down here with the girl laying on her stomach, would you consider that to be hard-core under Miller?

A. Yes.

MR. CAMBRIA: What is the page?

MR. FAHRINGER: I'm sorry. It would be 61, 62, 63, 64, 65, 66 — 67. The bottom of page 67. There's a girl laying on her face with just her rear exposed. Would you consider that hard-core pornography under Miller?

THE WITNESS: Yes.

BY MR. FAHRINGER:

Q. Why?

A. Because she appears to be masturbating.

Q. It appears she is masturbating?

A. She is sitting on her hands. Her hands are in her genital area.

Q. She's lying on her hands?

A. She's lying on her hands. She doesn't have any clothes on.

Q. That, in and of itself, wouldn't be a basis—

A. As to the idea that she might be masturbating.

Q. Now, on page 85, "Hustler Humor," would you consider — do you remember reading "Hustler Humor"?

A. Not specifically. I remember that the jokes had to do with sex. All of them.

Q. I take it that you don't recall reading this, but that didn't enter into your consideration—

A. Yes, I know by looking at and reading like several words all the jokes had to do with sex, and were dirty jokes. They weren't non-sexual jokes. They added to the reason we prosecuted the magazine. That was one of the reasons that added to that.

Q. Because of the dirty jokes. Because they were jokes that deal with sex, you considered that prosecutable?

A. Yes, in relation to the rest of the magazine. Certainly I'm talking about obscenity. It has to have something to do with sex.

Q. Take this joke: "Hustler's definition of Peter Pan, a washbasin in a whorehouse."

Would you prosecute a joke like that on itself?

A. You mean if someone came up on the street and said that—

Q. Yes.

A. Well, if someone came up and said that you couldn't prosecute anyway.

Q. Well, suppose it just appeared in a book of jokes. That was the theme of all the jokes, and all the jokes were like that?

A. If all the jokes were like that, yes.

Q. Do you consider that hard-core pornography?

A. Could be.

Q. Do you think that would appeal to the average person's morbid or shameful interest in sex?

A. I think it is intended to.

Q. You think it is intended to?

A. Well, what is a whorehouse if not for shameful sex purposes?

Peter Pan, obviously, you're redefining Peter Pan to give it sexual overtones. That's why I think you gave it shameful and morbid—

Q. Well, define what you think is morbid or shameful sex?

A. Okay. Prurient interests has been defined as shameful or morbid interest in sex, or excretion, and I think that means to be ashamed of, or to make sex a part of conversation simply to do that and for no other purpose.

Q. Okay. Now, "The Vulva of the Dolls." This is a series of pictures of dolls with sexual organs and things of that sort.

In your opinion, under the Miller test that qualifies as hard-core pornography by itself?

A. Yes.

Q. And why is that?

A. Because all of them have to do with sexual activity. I mean, obviously, sexual activity.

Q. These pictures in your opinion appeal to the average person's morbid and shameful interest in sex?

A. Yes.

Q. All right. Now, the story on Lenny Schultz, "Blue Star on the Horizon."

Did you read that article?

A. I didn't read as much of that article as some of the others.

Q. Less than a fifth?

A. Yes, because it seemed to be about — not as much sexually oriented as the rest of the articles.

Q. Would that article, standing by itself, ever be a basis of prosecution as far as you are concerned; I wondered — you haven't read the article so I don't suppose you can make a judgment?

A. Well, maybe in the way it is written — well, it does have to do with Lenny's acts which are the crazy things he does which are aimed at sex since they, you know, they don't recreate his acts, and it only tells what he does, maybe some you could say — if he did it in a theater, and that was a newspaper review, it might not be prosecutable.

Q. The rest of these seem to be a completion of the other articles, and then there is "Honey Hooker" in the end.

Would you prosecute that by itself; a book of cartoons like that?

A. Yes.

Q. Why?

A. Because even though it is a cartoon, it shows, obviously, she's simulating sex acts and ejaculation.

Q. All right. Now, can you give us in kind of just one statement what the basis of your prosecuting Hustler was, in addition to the starting of the prosecution for the cartoon?

A. Because I feel that, taken as a whole, Hustler magazine is aimed at and attempts to and succeeds in portraying the stories and the pictures purely for a sexual purpose. Everything is oriented to — almost everything in the magazine, maybe 95 percent is oriented towards sex, and not towards boating or fishing or something. Therefore, I feel the way it does so, I feel it is kind of crass.

It doesn't discuss sex in a serious manner for any legal purposes. I think it is for prurient interests. I think their reason is to arouse someone's prurient interest and bring out the sexual attention to bear on the magazine rather than the literary attention.

I found them to contain many lewd exhibitions of the genitals, and I feel this is what the Supreme Court means when it says "What kind of actions can be contained."

I thought that the whole tone of the magazine wasn't a serious attempt at providing pictures for art's sake, or articles for literary sake.

That's my judgment.

Q. All right. Now, what you're doing then when you say "I thought the intent of the magazine," you are using a subjective standard rather than an objective standard?

A. Well, it's every person's — it's an objective standard for me to decide whether the average person in my community, the City of Cleveland, would apply the Miller test to find it obscene—

Q. That's subjective—

A. —objective.

Q. When you say you thought the intent of the magazine was, it's subjective, isn't it? You don't know what the intent was?

A. No, I read the intent — I infer what the intent is from what I read.

Q. And that's subjective?

A. Well, that's a subjective process.

Q. There isn't anyplace you can look in a magazine to find the intent, it's a subjective process?

A. Yes.

Q. Now, I take it you wouldn't have prosecuted the magazine if instead of having some of the other materials, if it was made up solely of pictures of women with full frontal nudity, you wouldn't have prosecuted the magazine solely on that basis, would you?

A. We may have.

Q. Well, could you say one way or the other?

A. Depending on what it looked like, and what the pictures showed. Certainly if you have a book with nothing but pictures of women with their legs spread, I imagine—

Q. But you never prosecuted the magazine like that before?

A. No, I'm not sure—

Q. Certainly in terms—

A. Like I said, the cases that come to trial are usually the ones that we actually take an in-depth look at by the time they get to me. Because, like I said, several of the cases that were thrown out, we never look at again.

Bruce A. Taylor by Mr. Fahringer

Q. Well, let's take a look at the cases that went through the prosecution, to a conclusion to a jury verdict.

You never prosecuted a magazine just for full frontal nudity and genitals fully exposed, did you?

A. No. We didn't do it in the magazine with the kids, and I'm almost positive we did with Screw—

Q. Well, Mr. Taylor, I mean, that's children. That involved different considerations, didn't it? You told us, you indicated earlier that if adults stood around in positions like that, you wouldn't have prosecuted?

A. Maybe not.

Q. If you take the magazine, and going back to my original question, if it contained nothing but full frontal nudity, no matter how closely the genitals were exposed, you had never prosecuted a magazine like that before?

A. We had never prosecuted a magazine like Hustler.

Q. Well, you had never prosecuted a magazine just that consisted of pictures of full frontal nudity, had you?

A. Well, Hustler isn't like that.

Q. Mr. Taylor, you're not answering my question. Please, I know you're a lawyer—

A. I'm not sure.

Q. All right. Not to your knowledge, in any event?

A. I think Screw magazine was prosecuted, and as I remember, it did not have any actual hard-core penetration shown.

Q. But is that something — do you still have that exhibit around; would that be part of the file?

A. I imagine it is either in the Court of Appeals, or the police have it. It may have been destroyed.

Q. If there were pictures in Screw magazine of men and women having intercourse, some pictures, then my question would stand. In taking the July 1976 issue as an example, if that consisted of full frontal nudity, with the genitals fully exposed, you had never, to your knowledge, ever prosecuted a magazine like that before?

A. Maybe not a magazine. I'm not sure because we had several of them—

Q. Only to your knowledge, the ones that you knew about; you never knew of any?

A. No, I don't think so.

Q. All right. Now, in the next question I have, to your knowledge, again, with the ones that you know about, you had never prosecuted a magazine that consisted solely of stories, just stories dealing with sex, and the printed word. As I recall your testimony, you had no recollection of prosecuting a magazine just with the printed word in it, had you?

A. That's correct.

Q. Okay. And you had never prosecuted a magazine that dealt solely with cartoons with the exception of one incident you mentioned of Fritz the Cat?

A. Yes. But I don't think we ever got Fritz the Cat because they never stayed in the Cleveland area—

Q. All right. Another question I have is that you never prosecuted a magazine that had solely film reviews or book reviews dealing with X-rated films or X-rated books?

A. I don't know of any.

Q. All right.

A. I don't know of any magazines that just have that.

Q. Well, you know of magazines that just contain articles of sex, sex digest, and magazines that deal with nothing but articles of sex with no pictures, illustrations; you know of some of—

A. I know I — I know the—

Q. Well, let me ask you this: Are you familiar with Club magazine?

A. Yes. Vaguely.

Q. Are you familiar with Penthouse?

A. Yes.

Q. Gallery?

A. Yes.

Q. Genesis?

A. Yes.

Q. Oui?

A. Yes.

Q. Playboy?

A. Yes.

Q. Cavalier?

A. Yes.

Q. Swank?

A. Yes.

Q. Stud?

A. Yes.

Q. Dude?

A. Yes.

Q. Now, those magazines are all sold in this community, aren't they?

A. Yes.

Q. As a matter of fact, let me ask you this: I take it that in the last two years, since April of 1973, because of the element of contemporary community standards that now apply in local community standards under Miller, you have tried to keep somewhat abreast of the community standards, haven't you?

A. Well, yes.

Q. I take it what you have done is from time to time, either through the police work or people bringing them into you, or your own independent investigation, tried to keep abreast of the type of magazines and books sold in the community—

A. I'm aware of what is being sold, pretty much.

Q. Pretty much, and what is being shown in peep shows from your work—

A. Yes.

Q. And the motion picture houses?

A. Yes.

Q. Okay. Now, you've indicated to us that you know that Penthouse, Club, Gallery, Genesis, Oui, Playboy, Stud, Cavalier, Dude — Stud, are distributed in this area, and are sold and purchased here?

A. Yes.

Bruce A. Taylor by Mr. Fahringer

Q. Now, you've never prosecuted, in the years that you have been in charge of the prosecutions, you have never prosecuted any of those magazines, have you?

A. Not as of yet.

Q. Okay. And Hustler magazine is the first magazine of national distribution of the type we're discussing here that you have prosecuted, haven't you, isn't that so?

A. It's the first one that we know of that has a second class mailing privilege, and is sold nationwide.

Q. Well, you know these other magazines are sold nationwide?

A. We know — you mean, the ones you named?

Q. Yes.

A. Yes. We don't know whether the other magazines are nationwide or not.

Q. All right. In other words, what you are saying is that you know that the magazines I read off, and just to be careful here, Penthouse, Club, Gallery, Genesis, Oui, Playboy, Stud, Cavalier, Swank and a number of others that I haven't named, of that genera, or of that style, are sold nationwide?

A. Yes, that's right, I know.

Q. Now, have you under consideration right now, and by that I mean under investigation, any of the magazines that I have read off to you?

A. Well, "under investigation," yes. We've got several issues of several of them—

Q. Of magazines like Penthouse, Playboy, Oui—

A. Yes.

Q. And how long have they been under investigation?

A. Since last summer.

Q. And no prosecution has been started yet?

A. No.

Q. Been initiated?

A. Right.

Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience here as a prosecutor?

A. Well, it's unusual — this is the first time it has happened because we're waiting for this case.

Q. Is it your intentions, that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud—

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed.

Q. Okay. Now Hustler follows the same format, does it not, and I'm talking and I want to be very specific in terms of magazines; and if you don't mind, I'd like to designate—

THE COURT: Just a minute, Mr. Fahringer.

We'll go off the record.

(Discussion had off the record.)

BY MR. FAHRINGER:

Q. Could I use the term, Mr. Taylor, of the so-called men magazines or adult magazines to class so that we'll know what we're talking about between the two of us?

A. Yes.

Q. In terms of men-adult magazines — incidentally, would it be fair to say from your experience, there is on the market, in that category, and I named the leading ones, but anywhere from 75 to 100 different titles of these magazines?

A. I don't think I have seen that many.

Q. Would it be fair to say between 50 and 75?

A. No. I think the ones that you named are all the ones that I can think of. I have — you know, those have been brought to my attention because the defense attorneys bring them in for our criminal cases. They're bought at the airport, I know, but I don't know about all the rest. I don't know about the 50—

Q. You don't know the total?

A. Well, in the bookstores, magazine shops that I have been in, and the convenient type food marts, stop-n-shops and shopping malls, I don't see where they would have a big enough rack to have 50 different kinds.

Q. Well, I'm not saying that all these stores can. But if I told you that in Cincinnati, the wholesaler there that handles, you know, all the magazines, and he handles Reader's Digest, but he had indicated to me that there is anywhere from 50 to 75 of these men magazines that he handles; and he didn't handle all of them. Would you have a reason to dispute that?

A. I wouldn't dispute. I wouldn't be able to—

Q. Say that is so here in Cleveland.

Now in terms of this category of magazine, would it be fair to say all of these magazines, and I'm not — there may be some that only deal with men or with women, would it be fair to say that these men's magazines generally show women in the nude with the genitals exposed?

A. Yes.

Q. And that they contain stories dealing with sex?

A. Yes.

Q. And cartoons?

A. Yes.

Q. Letters to the editor?

A. Yes.

Q. And the so-called advise and consent where the readers write in about sexual problems and they are answered?

A. Yes.

Q. So that the Hustler magazine, in terms of format, follows the format of these other magazines?

A. Yes.

Q. Now, would it also be fair to say that in terms of comparing Hustler with these other magazines, some of these other magazines, now magazines such as Club, I think, Gallery, are showing scenes of simulated sexual intercourse; have you seen any of those at all—

A. Yes.

Q. —have they been brought to your attention?

A. Yes.

Q. Where there is a picture of a guy and a girl meeting and going to a hotel room and then it appears as though they are having intercourse, although there is no explicit sex?

A. Yes.

Q. Has it come to your attention that many of these magazines, in this category that we have been discussing, have

articles on bestiality, homosexuality, pedophilia, necrophilia and all of these so-called sexual aberrations?

A. Yes.

Q. Now, has it also been your experience, in your history as a person who has been involved in legal obscenity prosecutions, that in magazines like Club, and Penthouse, and Gallery, and Genesis, and Stud, and Cavalier and Swank, the pictures of the girls do show the vagina spread, as it were?

A. Yes.

Q. Now, wouldn't it be true then that, in terms of Hustler, as compared to many of these other magazines, and to be perfectly candid, Playboy, the pictures of the girls there, they for the most part show pubic hair and there isn't an awful lot of the vagina spread apart, so far, to date, at least; but in terms of these other magazines, so exclude Playboy, would it be fair to say that those magazines are comparable to Hustler?

A. That's right — I know I haven't seen all the issues.

Q. In terms of your experience, they would be?

A. The ones that I have seen are pretty much alike.

Q. Now, isn't it true that you would be hard-put, in terms of more explicit magazines in this category, like for instance Penthouse, Club, Gallery, Genesis, Stud, Cavalier — wouldn't you be hard-put to point out differences between those magazines and Hustler?

A. Well, you could find a lot of differences.

Q. Like what?

A. Certainly the kinds of stories they have in Hustler portraying the vagina or vulva more prominently than a lot of magazines that I have seen. Certainly Hustler's jokes are much more shocking, and you know, they have less thought process.

And are more grossly sexually orientated than any other jokes I have seen.

So I think that's a difference.

Q. Let me ask you this: How about — have you seen Club; how about the magazine where they show these simulated sexual intercourses and what the public would call "soft-core." Certainly, in terms of pictures, that would be stronger than Hustler?

A. Maybe in terms of pictures. As far as sex — maybe not as far as the vagina. I don't know — you know.

Q. Have you seen the pictures—

A. —around a whole lot different.

Q. The pictures are pretty much the same, aren't they?

A. Pretty much.

Q. All right. In terms of the articles, I take it you're not in a position to indicate, and I'm talking about the articles, like "Sex Play" and the interviews and that certainly is no different than, in degree or otherwise, than Penthouse, Club, Genesis, and Swank and Cavalier?

A. Only that I think — the few stories I have read in Penthouse, and I have never read any in any of the other magazines; but the few stories I have seen in Penthouse seem to be a little better written as far as literary words—

Q. Not in terms of content?

A. They still describe the same thing, and Hustler just doesn't — it's a lower mentality basis, or at least a lower level of grammar.

Q. But you are not saying that with Swank, or Stud, or with Genesis or Gallery, the lesser magazines?

Bruce A. Taylor by Mr. Fahringer

A. Not as far as I know. I don't know that much about the rest of them.

Q. Now, in terms of the cartoons, and again I'm not pressing you on this, have you seen the cartoons in the magazines — and I realize there are degrees. I normally think of in terms of circulation, Playboy is number one, Penthouse is number two, and then I believe comes Club. But when you get down to Gallery and Genesis, are you able to say the cartoons in Hustler are more tasteless than those in Genesis, Gallery, Stud, Cavalier and Swank?

A. I don't know. I haven't — I don't know. I don't think I ever looked through a Stud; and I think I have seen a Swank. I know I have seen a Penthouse, and I know I have seen Genesis and Gallery.

I don't remember many cartoons of the type that I have seen in Hustler.

Q. Okay. In terms of the cartoon series in the back, have you seen "Wicked Wanda" in Penthouse?

A. Yes.

Q. And have you seen "Annie Fannie" in Playboy?

A. Yes.

Q. And are they comparable to "Honey Hooker" in terms of, at least, being a four, five page cartoon series with drawings?

A. They're about the same size as far as length.

Q. And in terms of the theme of the stories where a girl gets herself in some way imperiled in a crazy, bizarre sexual episode, and is then ultimately extricated, is the theme just about the same?

A. No.

Q. You don't think so?

A. I don't think "Annie Fannie" comes anywhere near close to "Wanda"—

Q. I mean "Honey Hooker"?

A. "Honey Hooker"—

Q. What about "Wicked Wanda"?

A. Well, "Wicked Wanda" doesn't seem to have very much sex in it at all.

Q. Well, that deals with a great deal of lesbianism?

A. Obviously, she's got a girlfriend, and they're laying around in the nude. You know they must be lovers; but they don't show that like it does in "Honey Hooker"; and "Annie Fannie" never, as far as I know, showed any sex.

Q. All right. Now, finally, let me ask you this: Do you have any written records of your own, and we're going to talk to the police officer in a moment, relating at all to the prosecution of this case?

A. Just my own notes where I made phone calls to people, people to call, and that kind of thing.

Q. In terms of witnesses and things of that sort?

A. Yes.

Q. Would any of those relate, at all, to your judgment process in deciding whether or not—

A. Nothing was ever written down at all.

Q. How about anything written on a cartoon, and the contents of the cartoon?

A. We — I never made notes on the—

Q. Contents of the magazine?

A. Never.

Q. All right.

MR. FAHRINGER: Judge, I think that concludes my examination.

THE COURT: One question. I think you have discussed one issue.

MR. FAHRINGER: Yes.

THE COURT: Mr. Taylor, if the questions were asked of you concerning the other issue that is involved, would your answers be more or less the same?

THE WITNESS: Yes.

MR. FAHRINGER: Thank you, Judge. I appreciate that.

MR. CAMBRIA: Judge, I just have a few questions—

THE COURT: Mr. Cambria, can you wait a minute, please?

I think we should take a short recess.

(Thereupon a recess was had.)

MR. CAMBRIA: Your Honor, I only have a few questions.

BRUCE A. TAYLOR BY MR. CAMBRIA

EXAMINATION OF BRUCE A. TAYLOR

BY MR. CAMBRIA:

Q. Mr. Taylor, did you ever directly or indirectly communicate to any distributors that they should not sell Hustler magazine?

A. No.

Q. The distributor—

A. There's only one distributor—

Q. Klein?

A. Klein. Well, now there's more.

Q. All right. Did you make any communications to him directly or indirectly?

A. I wrote him a letter.

THE COURT: Just one second. We're here on a motion to dismiss on discriminatory prosecution, for selective prosecution—

MR. CAMBRIA: That's correct.

THE COURT: What basis—

MR. CAMBRIA: Well, Your Honor—

THE COURT: Are the basis of the questions?

MR. CAMBRIA: I'm trying to focus in on the focus of their prosecution. They are only interested in one magazine, and I think if I can go on, Your Honor, here, I can indicate to you what I'm looking for.

THE COURT: All right. Go ahead.

BY MR. CAMBRIA:

Q. Now, what were you about to say about Klein News?

A. We talked to Klein News.

We, basically, told them of our intentions to charge Hustler. When we did decide to charge Hustler they indicated that they would probably stop selling or stop distributing it if we did charge them. They said to let them know if we did charge them, and when that would be. And we did write a letter.

Q. You initiated that, and wrote them a letter, is that correct, indicating that you intended to prosecute Hustler?

A. Yes.

Q. All right. Did you indicate that you were intending to prosecute any of the other nationally distributed magazines that we have mentioned here this morning?

A. No.

Q. Just Hustler, and do you have that letter?

A. I think so.

Q. Okay.

THE COURT: I want to ask you a question, Mr. Taylor.

If you have the letter, they can ask you in discovery.

BY MR. CAMBRIA:

Q. Mr. Taylor, let me ask you this: You began an injunction proceeding, didn't you, against Hustler?

A. Yes.

Q. Did you begin one against any other nationally distributed magazine, men's magazine?

A. No.

Bruce A. Taylor by Mr. Cambria

Q. Now, you said earlier, I believe, that you had some of the other magazines under investigation.

Now, what did you mean by "investigation"; did you mean you knew they existed or—

A. Yes.

Q. Had you done anything?

A. No. We looked at other magazines after we looked at Hustler.

Q. In other words, you had initiated the prosecution of Hustler, and then you looked at some other magazines?

A. Yes.

Q. When did you look at the other magazines in reference to the time you prosecuted Hustler?

A. Well, certainly we were aware there were other magazines—

Q. Was it — excuse me. Maybe I can make it a little easier.

Was it like a month later, two months later or what?

A. We never, actually went into a formal — bring us some other magazine and we'll make a file of this.

We knew other magazines existed and they were discussed.

Q. So in other words, when you say you had other magazines under investigation, you mean you knew they existed?

A. Yes.

Q. You didn't take any formal steps towards working up a prosecution as to the other magazines?

A. That's correct.

Q. You didn't review any of them with the specific thought in mind of prosecuting them, is that right?

Bruce A. Taylor by Mr. Cambria

A. No, but we did view some of them with the specific intent of seeking an injunction.

Q. All right. This was after the prosecution was initiated against Hustler?

A. Yes.

Q. And was it after the present motion was filed pointing out discriminatory prosecution?

A. No, it was the same time we had asked for an injunction against the September Hustler.

Q. Okay. Did you ever open any criminal files, or prosecution-type files against these other magazines?

A. No. The police never seized any, et cetera, for the purpose of doing that.

Q. All right. Did you ever initiate any of the other injunctions against any other magazines?

A. No.

Q. And what specific issues, if you can remember, of the other magazines did you review for the purpose of an injunction?

A. We were concentrating on an injunction that would include Hustler and probably any number of the other five or six. We were going to think of five or six, maybe a dozen, to include Penthouse, Genesis, Gallery, Oui, Knave, Cavalier — I don't know. Several.

Q. Are you telling me you were contemplating doing it, or did you actually go out and acquire these other issues and look at them, and then just settle on Hustler?

A. Well, we had seen these other magazines which had been introduced in our trials by defenses. We knew, basically, what they were.

Bruce A. Taylor by Mr. Cambria

Q. All right. The question is still that at the time you made the decision on Hustler, as far as the injunction, did you actually look at other magazines for the same month as the Hustler magazine that you brought the injunction against?

A. Yes, we had — the police had a couple of issues of Penthouse and there were several magazines like Knave, Cavalier, Genesis, Gallery — I don't remember.

Q. All right. But you didn't proceed against them?

A. We had Knave specifically, and what's the other one — there is one other one. I think Swank, I'm not sure.

Q. Okay. I take it now that there are no active files that you have directed towards a prosecution of these other magazines that you know of?

A. We haven't started any, no.

Q. All right. Now, I think you have indicated in your brief here that you selected the defendants in this case by scanning the masthead, is that correct?

A. Yes. They're listed in the first page.

Q. And for instance, let's take Jimmy Flynt. Was there any investigation aside from looking at the masthead in arriving at your decision to prosecute him?

A. Yes.

Q. All right. What was that?

A. There were other investigations done by the police into his position in the company, and his position of ownership and his job, you know, involvement.

Q. All right. I take it that you interviewed some people regarding that?

A. Well, the police checked into things, and we also talked to other law enforcement agencies.

Q. And you talked to the law enforcement agency in Hamilton County, Ohio?

A. I talked to him, Mr. Leis and Mr. Cartolano, his investigator, in September. So that was afterwards.

Q. Now, when you did the investigation, let's say as to Jimmy Flynt, was this after the charges were brought against Jimmy Flynt in northeast—

A. Done before—

Q. Prior?

A. Some before, some after.

Q. How about Althea Leasure? Did you do any independent investigation regarding her aside from the masthead?

A. Yes.

Q. And was this again by questioning people?

A. Yes.

Q. Okay.

A. You know, reading printed material and things. Documents, interviews.

Q. And did you make a record, report of this?

A. Well, I have, you know, notes of who I talked to, and to certain different notes where I can find things again.

Q. Okay. This was done all prior to the time that the prosecution was brought in this case?

A. Some before, some after. Much of it after.

Q. Much of it after?

A. Much of the filling in blanks, specifically, dates, times, things like that, afterwards.

Q. All right. Now, let me ask you this: When you made your decision in this case, did you make the decision or did you, in effect, approve a decision made by the police to prosecute?

A. Well, the police came with the request and asked me whether or not it was possible to charge the officers of a corporation in Columbus for something that was done in Cleveland. I indicated, "yes."

Then we decided to make the investigation to decide how we could do it.

Q. Now, when you were making your decision as to whether or not there was reason to prosecute the magazine, I take it that you had to operate with your own definition of what constituted serious, is that correct?

A. Yes.

Q. And you employed that in reviewing this issue to make the determination, is that right?

A. Yes.

Q. All right. What was your definition that you employed?

A. Well, I think our community thinks of serious values as it relates to scientific, educational or political as being an attempt to teach someone something with a purpose of enlightening a person on something they don't already know; or correcting an aberration that may have been read to them, or like scientific, to point out something for a serious purpose. Meaning to give you some knowledge you didn't have before.

Q. Instructional. Educational or instructional, is that more or less your definition?

A. Yes.

Bruce A. Taylor by Mr. Cambria

Q. All right. Now, when you say our community or your community, what did you do, if anything, to ascertain what the community standards was?

A. Well, my experience is mainly the way I read the community. Certainly I can't make all the decisions. I didn't go out and ask everybody what they thought—

Q. What particular factors played a part in your consideration, what community — it wasn't your—

THE COURT: Mr. Cambria, aren't you now going into the elements constituting legal obscenity as defined by the Miller guidelines or something of that sort, that you should better leave to a trial of the facts?

MR. CAMBRIA: What I'm trying to do, Your Honor, we went through the prurient interests parts of it, and the actual definition—

THE COURT: Perhaps we went pretty far afield. Mr. Taylor, not having someone here with him to perhaps voice some objection or something of that sort, has spoken for the record quite extensively.

I think the sole question here is whether or not the State entered into some selective prosecution, and not whether or not Mr. Taylor himself believes that this particular magazine, or Oui or Genesis or whatever it is, these other magazines are as obscene or more obscene or equally obscene or whatever it is.

MR. CAMBRIA: Well, with regard to this, the only thing I'm trying to develop since he apparently, made the decision, and he had to make that, segregating one magazine from another magazine, I was trying to arrive just to what the basis for — what his decision or distinction was. That's why I was asking the questions.

THE COURT: All right, sir. Go ahead.

Bruce A. Taylor by Mr. Cambria

BY MR. CAMBRIA:

Q. Let me ask you this: You said something on Mr. Fahringer's cross, and he asked you whether or not you were going to prosecute all the rest of the magazines, and you said you couldn't make that decision. Do you recall that?

A. Yes.

Q. But are you telling us here today you could and did make the decision regarding Hustler magazine?

A. Yes. I mean, it's not my decision only because the police play a part, and the chief prosecutor plays a part; and certainly, the events play a part in it.

Q. Then I take it with regard to the other magazines, the only thing you have to do is consult with the police and consult with the chief prosecutor—

A. And the law department—

Q. As to whether or not — the director of law?

A. Yes.

Q. The same thing that you did here, is that correct?

A. Yes.

Q. I mean, it wouldn't be any different procedure. It wouldn't be out of your hands, so to speak, with the same steps you followed in connection with making the decision in this case?

A. Yes. Except that Hustler — this prosecution of Hustler was pretty much started as an effort between the police and myself; and it caused such a, you know, large scale publicity, if we were to go against Hustler or any other magazine, I'm sure you would have to look at the effects and certainly find out what happened in this case. There are a lot of things that would take part in another consideration taking into consideration with Hustler because it was our first.

Bruce A. Taylor by Mr. Cambria

Q. In other words, if you were to make a decision as to whether or not you would prosecute some of these other magazines, then the public concern or publicity factor would play a part; it that what you are saying?

A. My decision wouldn't be any different. I would be willing to prosecute, anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case.

Q. In other words, before you would make a decision to go against any of these other magazines, you would want to consider all these people that may play a part in it, and all the publicity, perhaps, that may be involved in it, and perhaps public reaction and a lot of other things?

A. Certainly the public reaction would have to do with whether they felt it was obscene. We would have to judge whether they felt the magazine was obscene by what happens. We had to judge community standards again, maybe.

Q. All right.

A. And we're not concerned whether there's going to be more publicity or less publicity.

Q. Well, you said, didn't you, just a few seconds ago, that because of all the publicity that was attached to this case, you have to discuss it with some other people as to whether or not you were to prosecute these other magazines, you said that?

A. Certainly, because one of the considerations is my time, and how much time I take away from one prosecution we can't afford to spend. The City might not be able to afford to have me doing nothing but these magazines—

Q. What does publicity have to do with it?

A. Well, the more publicity and the more time it takes, the more drawn out the cases are. Most of our cases don't take anywhere near this much time.

THE COURT: The court disagrees with that statement. I don't think — I hope the publicity, whatever it is, has not drawn out this case. This case has been heard on the motions as time will permit, and as the various parties have been available.

This court has been available all the time and the publicity angle of it certainly has not been a factor in the prosecuting of this case. At least as far as the court is concerned.

The time that it has taken to hear these motions has been based upon the availability of the attorneys, and the time schedules which they have.

So I just wanted to set the record straight on that point.

BY MR. CAMBRIA:

Q. You'd agree with that, Mr. Taylor?

A. What I mean is that the publicity plays a part in gauging what the community feels about what we're doing.

Q. So in other words, if you're going to make this future determination regarding these other magazines, you're going to be looking at other things other than just what the content of the magazine is; you're going to be looking to what is going on around you, and how people react to the prosecution?

A. Certainly, that is a thing that has already taken place. It's already been considered.

Q. But you did indicate that would affect your future decision regarding these other magazines?

A. Oh, certainly.

THE COURT: Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute,

or the City of Cleveland, that you first determine what the public feels about it before you proceed to—

THE WITNESS: What I meant is that if we get a jury verdict of not guilty that, to me, is an indication or might be an indication of whether we were right in gauging whether it is obscene. That certainly would have to be taken into consideration.

THE COURT: You're talking about a judicial trial. You're not talking about publicity. You're not talking about—

THE WITNESS: No, the newspapers now—

THE COURT: Well, that's the indication that the record is going to indicate.

You're talking about a judicial trial. So the result after a judicial trial may have an influence on how you may prosecute, and not what the publicity is that might be involved in it?

THE WITNESS: Yes.

THE COURT: All right. I just wanted to satisfy—

MR. CAMBRIA: You didn't say that initially, did you; you just added—

THE COURT: I think he meant that, Mr. Cambria.

THE WITNESS: When you talk about the considerations to prosecute, there are always, you know, several considerations of — the prosecutor always has to determine based on time which fact situations you can present to trial.

BY MR. CAMBRIA:

Q. All right. Let me ask you this: In indicating all these other magazines that we have talked about aside from Hustler, I take it that they are sold throughout the community, are they not?

A. As far as we know, yes.

Q. Not just through the airport, as you indicated, but throughout the entire community?

A. It's been indicated — the testimony has been to that effect in cases. The police know that, I didn't.

Q. Have you, yourself, had an occasion to visit some of the local drugstores or whatever, and seen copies of magazines displayed next to Hustler prior to this investigation?

A. Yes.

Q. The same kind of book, Penthouse, Oui and all of these others displayed in the same place and in the same manner?

A. Yes.

Q. And that was the state of facts at the time you brought the prosecution in this case that they were all, apparently, up there in the same way and sold in the same manner?

A. Yes, as far as we know.

Although there was one exception to Hustler, and Hustler was barred for sale at the airport. I imagine, at least a year ago or something. That was done by Mr. Putka, who is the commissioner of ports and harbors.

Q. Have you had any opportunity to determine if he banned any other magazines from being sold there, let's say, in the last ten years?

A. I don't know.

Q. So in other words, the Hustler situation came to your attention, apparently you are involved in it here, and it came to your attention, is that correct?

A. Yes.

Q. But you don't know whether or not any other ones have been taken down from the airport, from the stands?

A. No.

Q. Now—

THE COURT: Mr. Taylor, as a practical matter, do you not know whether there has been any other magazines banned at the airport?

THE WITNESS: I don't know.

THE COURT: Have you had any testimony in previous trials?

THE WITNESS: I know that Penthouse and Gallery and most of those other magazines are still being sold — still being purchased by the defense.

I know Mr. Putka, when he testified once, said he told Hustler not to be sold there and he forbid Hustler from there, you know.

I don't know what kinds of other magazines they may have reviewed in the past not to allow there.

Most of the magazines he's talking about are still for sale there.

THE COURT: What his question is: From your experience, do you know for a fact that Hustler is supposedly banned from the airport, or any of these other magazines—

THE WITNESS: There's all kinds of thinking. I have mentioned—

MR. CAMBRIA: You don't know whether or not these magazines—

THE WITNESS: Certainly, most of them haven't been banned.

BY MR. CAMBRIA:

Q. Do you know whether or not certain issues of these magazines have ever been banned; do you ever monitor them that consistently?

A. No.

Q. You don't know?

A. The police have been doing the investigations—

Q. You personally—

A. —a year ago.

Q. You personally, your own personal knowledge, do you know? Not by the police.

A. No. I don't.

Q. All right.

MR. CAMBRIA: All right. I have nothing else at this time, Your Honor.

THE WITNESS: Judge, I have some questions I would like to answer by myself, if I may be permitted?

THE COURT: I think Mr. Fahringer called you as a witness—

MR. FAHRINGER: Yes, I did, Judge.

THE COURT: Do you want him to make a statement—

MR. FAHRINGER: Judge, I would think, in all fairness, if he had a lawyer he could ask him questions. I don't think it would be right for me to object.

THE COURT: All right, sir.

THE WITNESS: There is one instance that I know of where the police were called out to the airport and made an investigation of several kinds of magazines that were sold at the airport including Penthouse, Genesis and Cavalier.

The result of that investigation was to require the airport newsstands to remove all men's magazines, and to move them to separate sections and cover up the covers so that you couldn't see them unless you were an adult. You could just see the titles and, I think, they did this with all the magazines.

I don't know if this was before or after they banned Hustler, but as far as I know it is still in effect because they still can't show them out there.

Another question, if you were to ask me or if I were to ask me, what were some of the reasons for prosecuting Hustler.

I would have to first say that after it was brought to our attention, maybe because of the cartoons and that's the only thing the people mentioned on the phone, it didn't matter. I had to review the magazine and the judge had to review the magazine as a whole. And another consideration has to be since we only have misdemeanor jurisdiction, we can only serve warrants from our Municipal Court in the State of Ohio. If we were going to prosecute Penthouse magazine, we wouldn't be able to prosecute the owners or the publishers of the magazine because we don't have any extradition power.

BRUCE A. TAYLOR BY MR. FAHRINGER

Larry Flynt and his brother and now, his wife, reside and operate from Columbus, Ohio, which is in our jurisdiction. We can arrest them, and that was one of the major considerations to going against Hustler instead of something else.

If we were going to enter into this field, we had to decide how we were going to do it. Certainly we can arrest Hustler magazine officers because of the misdemeanor warrants issued from Cleveland can be served in Columbus. Misdemeanor warrants cannot be served in Chicago or London. That's another consideration for the reason we prosecuted Hustler magazine in the first place—

MR. FAHRINGER: Your Honor, I have just a couple of questions on that.

FURTHER EXAMINATION OF BRUCE A. TAYLOR

BY MR. FAHRINGER:

Q. Mr. Taylor, first of all, you can prosecute any magazine because we're talking about something that is claimed to be obscene.

You can prosecute any magazine that is sold in this county by prosecuting either the retailer or the distributor, can't you?

A. That's correct.

Q. And in the past you have five hundred and some cases and a number of those magazines as far as you know, may have been distributed in other parts of the country, isn't that so?

A. Yes.

Q. And you prosecuted them here?

A. Yes.

Bruce A. Taylor by Mr. Fahringer

Q. And isn't it also true that in some of those cases as far as you know the operator, the publisher of the magazine might well have been out of state?

A. Yes.

Q. And your motivation for prosecuting those magazines was that the magazine was obscene, and your ambition was, because the crime was being committed in — is it Cuyahoga County?

A. Yes.

Q. —Cuyahoga County, you brought the prosecution, isn't that true?

A. Yes. We had hoped also to prosecute the people that sell it directly, usually.

Q. Now, are you also familiar with the fact — of course you can extradite from out of state under the uniform extradition contract between this state and other states?

A. Well, we can't serve a misdemeanor warrant. We can't bring somebody back here unless it is a felony case. We have no jurisdiction to try a felony case.

Q. Well, what I'm saying is that, are you saying that you can't, in the State of Ohio, you cannot — I realize this involves the laws of other states, but you can extradite on a misdemeanor, can't you?

A. I couldn't issue a warrant for pandering obscenity and have the police drag someone here from New York City.

Q. No. I'm suggesting this: What you can do is initiate a warrant in this community, either for a felony or misdemeanor, and then depending upon the laws of the other state, you can, by extradition proceedings, have that person brought back to Ohio without going outside the state. You know that, don't you?

A. I don't think I can do that for misdemeanors. I think just for felonies. Our governor would not entertain an extradition for anything other than felonies.

Q. Do you know that depends on the laws of the state; in other words, in some states they will honor a misdemeanor warrant for extradition, and other states will not.

A. Yes, but it's not common practice for us to do that.

Q. You're not saying it can't be done?

A. Not that I know of.

Q. Okay. All I wanted to do is make the record clear. As far as you know, you have never investigated, have you?

A. No.

Q. You have never investigated that if I initiated a prosecution here, a misdemeanor or otherwise, for Penthouse or for Playboy, you have not investigated whether the State of Illinois, or the State of Michigan or the State of New York would honor an application for extradition. You've never investigated that?

A. As far as I know, they'll only entertain that for a felony case. But that's only as far as I know. I never dealt with the law to need it.

Q. Now, you've never investigated as far as New York or Illinois, have you?

A. No.

MR. CAMBRIA: Just a couple of questions, if I may, Your Honor?

BRUCE A. TAYLOR BY MR. CAMBRIA

FURTHER EXAMINATION OF BRUCE A. TAYLOR

BY MR. CAMBRIA:

Q. The police involved here in this literature squad, they don't just work for you, they're available to any people, the county prosecutor as well as the municipal prosecutor, aren't they?

A. Oh, sure.

Q. And there wouldn't be anything to prevent them, to your knowledge, from taking any investigation which might require extradition to the county prosecutor so he could extradite them as opposed to you?

A. Yes. Because the county prosecutor can't unless he's going to go the ways that they did in Cincinnati, to charge organized crime. Only a second offense can be a felony—

Q. The county prosecutor can—

A. He has misdemeanor jurisdiction, but he has never chosen to exercise it in the pandering area.

Q. So you wouldn't have any idea as to whether — first of all, you would agree with me that a second conviction constitutes a felony?

A. Yes.

Q. And do you have any personal knowledge as to whether or not perhaps Swank or Club or one of these other magazines has been convicted once?

A. No.

Q. You don't know that?

A. No.

Bruce A. Taylor by Mr. Cambria

Q. So in other words, you can't rule out, at least based on your knowledge, that they had a conviction, and therefore, the second would be a felony; and the county prosecutor could extradite them in here?

A. It would have to be a conviction in Ohio.

Q. I understand that. I understand that. You can't rule that out because you don't know, is that right?

A. That's correct.

Q. But the point is this, you didn't make any attempts to refer the matter to the county prosecutor to have them investigate as to whether or not they could extradite somebody here?

A. Certainly not.

Q. All right—

A. It's not normal procedure.

MR. CAMBRIA: No further questions.

THE WITNESS: I'd like to explain to the court that when we decided whether or not to prosecute Hustler magazine, and in deciding who to prosecute, since we felt that a nationwide second class mailing privilege magazine had heretofore had not been the subject of day-to-day litigation, we felt it might be unfair to pick as our first target some man who has been selling, like everybody else, has been selling it for years; and we felt the people who should be responsible were the people who make the magazine. That's why we did not arrest anyone in the Cleveland area, and arrested Larry Flynt and his officers.

MR. FAHRINGER: Of course, that would attract more public attention to it also?

THE WITNESS: Yes, but I didn't know who Larry Flynt was before I issued the warrant. I never heard of him before.

MR. FAHRINGER: All right.

MR. CAMBRIA: Well, have you ever heard of Hustler magazine and heard about the indictment in Cincinnati which was about a year prior to your indictment?

THE WITNESS: We found about the Cincinnati indictment after we had charged, and then I found out that it was a long time before. I didn't know anything about that.

MR. CAMBRIA: You had no communication with Simon Leis?

THE WITNESS: No.

MR. CAMBRIA: How about the police officers as opposed to you, if you know?

THE WITNESS: As far as I know, they didn't know anything about it either. They treated it as a first impression also.

MR. CAMBRIA: To your knowledge?

THE WITNESS: Yes.

MR. CAMBRIA: Thank you.

MR. FAHRINGER: Your Honor, if we could just have Mr. Nemeckay. I don't think I will be long with him.

THE COURT: Sure.

STEVEN NEMECKAY BY MR. FAHRINGER

THEREUPON, the defendants, to further maintain the issues on their part to be maintained, called as a witness STEVEN NEMECKAY, of lawful age, who, having been first duly sworn, was examined and testified as follows:

EXAMINATION OF STEVEN NEMECKAY

BY MR. FAHRINGER:

Q. Mr. Nemeckay, am I pronouncing your name correctly?

A. Nemeckay.

Q. Nemeckay. Would you tell me a little bit about your occupation, where you are employed?

A. The City of Cleveland Police Department, Bureau of Inspection, Special Investigations Unit on the obscenity detail.

Q. How long have you been on detail?

A. Approximately four years.

Q. Were you responsible for the purchase of two magazines, one entitled Hustler, July 1976, and the other, Hustler, August, 1976?

A. Yes, sir.

Q. I show you — we're not marking these, Officer, but they're deemed to be marked Exhibits A and B, July, 1976 and August, 1976, does that bear your marking?

A. Yes.

Q. All right. Incidentally, there is a cellophane bag here, were these magazines here wrapped in some sort of cellophane when you purchased them; it was with — it was inside the envelope?

A. Are there two of them?

MR. CAMBRIA: Yes.

THE WITNESS: One in each bag?

MR. CAMBRIA: Yes.

MR. TAYLOR: I think there are—

MR. FAHRINGER: No, there's one—

THE WITNESS: Yes, then there was one on each lower half of the magazine.

BY MR. FAHRINGER:

Q. In other words, so that we have it straight, this cellophane wrapper would go across the bottom of the magazine so it would cover the — like that?

A. That's the way.

Q. And that was on both of them, if they were both in bags?

A. Yes, sir.

Q. Now, incidentally, would you indicate to us from your handwriting where you purchased both the magazines, the July and August magazines?

A. The July magazine was purchased at 1834 East Sixth Street, and the August edition was purchased at 1930 East Sixth Street.

Q. Could you describe those places; give us the names of those places?

A. 1834 East Sixth Street is Sam Klein's Cigar Company.

Q. And the other one?

A. Erieview News.

Q. All right. Now, are these places that sell other magazines and other publications?

A. Yes, sir.

Q. Incidentally, did you purchase Hustler magazine as a result of instructions that were given to you?

A. Yes, sir.

Q. All right. Who gave you those instructions?

A. The prosecutor.

Q. Mr. Taylor?

A. Yes, sir.

Q. In other words, he indicated to you to go out and buy the July and August issues of Hustler?

A. Yes, sir.

Q. Did he indicate where you should go?

A. No, sir.

Q. He left it to your discretion?

A. Yes.

Q. Did he indicate that you should purchase any other magazines other than Hustler in connection with this investigation?

A. No, sir.

Q. All right. So you were told to buy, specifically, the July and August issues of Hustler, you weren't told where to go to get them?

A. That's correct.

Q. All right. Did you go in other establishments to see whether or not Hustler was sold other than those two?

A. Yes. We checked several locations in the downtown area.

Steven Nemeckay by Mr. Fahringer

Q. Did you find that there were other places that were selling Hustler?

A. No, sir, there were not.

Q. So these were the only two locations that you went to?

A. The immediate downtown area, yes, sir.

Q. Now, incidentally, how many establishments did you check, if you know?

A. At least a half-dozen.

Q. And you only checked the immediate downtown area?

A. Yes, sir.

Q. Now, when you went into those two establishments that you described, did you also notice on sale other men's magazines such as Playboy, Club, Gallery, Genesis, Oui, Cavalier and Swank?

A. There were other magazines.

Q. You're not certain of what the titles were, I take it?

A. No, sir.

Q. Do you know Playboy magazine?

A. Yes.

Q. You are familiar with it?

A. Yes, sir.

Q. Penthouse?

A. Yes, sir.

Q. Do you know Club magazine?

A. Yes, sir.

Q. Gallery?

A. Yes, sir.

Q. Genesis?

A. Yes, sir.

Q. Oui?

A. Yes, sir.

Q. Cavalier?

A. Yes, sir.

Q. Swank?

A. No, sir, I don't know Swank.

Q. You don't know Swank. Do you know other magazines that I haven't mentioned that are so-called men's magazines that deal with women in the nude and things of that sort?

A. I just know the titles.

Q. All right. Can you tell me when you went into these two establishments, if you recall whether or not Playboy was on sale at either of those two?

A. I believe it was.

Q. All right. What about Penthouse?

A. I don't recall.

Q. Club?

A. I don't recall.

Q. Do you recall any other men's magazines being on sale there? I mean, you know there were other men's magazines being sold?

Steven Nemeckay by Mr. Fahringer

A. I couldn't recall by title.

Q. You couldn't recall by title?

A. No, sir.

Q. Now, do you have a reporting procedure that you follow concerning investigations when you purchase a magazine?

A. Yes, sir.

Q. All right. Do you have any reports that you filed in connection with this investigation?

A. Yes, sir.

Q. And are those reports here in court?

A. No, sir.

Q. Are they easily available?

A. Yes, sir.

MR. FAHRINGER: Okay, We subpoenaed them, and I thought they would be produced in court, Judge.

MR. TAYLOR: I have two such reports, Your Honor.

MR. FAHRINGER: Your Honor, may we see those under Rule 16?

MR. TAYLOR: I would object. That is a work project. I wouldn't object to the specific report, but to hand over the whole report—

THE COURT: Let me see what the subpoena says.

MR. FAHRINGER: I have the — Judge, this would be the one—

THE COURT: All right. What is the situation, Mr. Taylor?

MR. TAYLOR: Okay. Certainly under Rule 16 work products are specifically excluded. Statements of witnesses, or memorandums written by them may be reviewed and examined after testifying to decide whether or not there are any inconsistencies.

This is a police report regarding this case. This police report — it is not their privilege to subpoena this. I think the officer can have his report to read from it, and for specific questions asked, to refresh his recollection or his memory with it; and therefore, after his testimony if the court was to review his report, and there were any inconsistencies, we would have no objections then.

MR. FAHRINGER: Judge, my application to the court is this: The inquiry here goes to the prosecution itself. If there's anything in these reports that relates to this, it seems to me under subpoena power and a matter of information which we're bringing to your attention, supports our claim, and it should be available to us.

The other one is, of course, that we have a witness that is testifying, and if there is anything in the reports that are inconsistent with what he said on the witness stand, I think we would be entitled to it.

What I would like to suggest, Your Honor, if there is anything in the reports that is in anyway strategic or tactical, I don't see any harm in my seeing them—

MR. TAYLOR: Well, it is just practice. We don't like to agree that police reports are not privileged, and certainly they can't get reports one way and if that's not allowed, they get it another way—

MR. CAMBRIA: It seems to me that first of all, the remedy would have been a motion to quash the subpoena and in addition to that, there are also situations where material not usually — frankly, Grand Jury minutes.

Steven Nemeckay by Mr. Fahringer

This is an instruction hearing, and if we had the witness on the stand testifying before the Grand Jury and in the normal course of events, we wouldn't get the Grand Jury minutes. Because he is testifying, and we're cross-examining him, we're entitled to Grand Jury minutes even though in the normal course of events we wouldn't get them—

MR. FAHRINGER: I anticipated that there would be resistance—

MR. TAYLOR: I don't think so. Not that there is anything to hide. It is just that the police reports, we prefer to have them remain privileged wherever possible. I don't like to deviate from that.

THE COURT: Obviously, the summary of the activities taken in the Hustler magazine is privileged communications. It is evidence that you were going to — which can be discoverable, but which the court will not permit that to be used.

MR. TAYLOR: Certainly things like dates and times and facts not—

THE COURT: If they don't ask you, you are entitled to reserve that until you are asked.

MR. TAYLOR: We already gave most of the information.

THE COURT: All right. Fine. Let them have it then. The court will rule on the police report. As of now it is not permitted, but we'll see if there is any problem during the testimony.

MR. TAYLOR: That's Officer Nemeckay's report on July 2nd, 1976.

BY MR. FAHRINGER:

Q. Officer, concerning your activities that you described so far in going into the premises and purchasing the magazine, did you then bring them back and display those magazines to the prosecutor, Mr. Taylor?

A. Well, he was present when we purchased the July edition.

Q. Mr. Taylor was present when you purchased that?

A. Yes, sir.

Q. And what about the August issue?

A. I went out and purchased it, and presented it to him.

Q. Now, did you have two separate discussions; I presume you did, on the July issue and on the August issue, or were they discussed together?

A. No, those were separate discussions.

Q. In connection with those discussions, did you take the call, originally, the first complaint concerning the political cartoon?

A. The first complaint was from Captain Delau, my immediate supervisor, and he had the July edition which the complaint came to him relevant to the contents being of sexual activity, and possibly falling within our enforcement.

Q. Well, I'm specifically asking you about the cartoon. I understand from Mr. Taylor that the original complaint was that someone had complained about the cartoon?

A. Yes.

Q. That three of these figures were having intercourse with the Statue of Liberty?

A. Yes, sir. That was directed to Captain Delau. We received

several anonymous complaints over the phone relative to the publication.

Q. Now, did they relate to the cartoon also?

A. They related to the publication itself.

Q. Specifically, like what?

A. Well, that's quite awhile back. I will have to say, that the magazine in general.

Q. Was that included in your report, the complaints?

A. Yes, sir.

Q. And that's the report that the judge has?

A. I don't recall what was in that report there.

Q. Is there another report of the complaints?

A. No, sir. That probably would fall within the July report I had.

Q. So that the report might tell us little more specifically about the complaints.

How many complaints were there?

A. If I can remember, maybe three or four.

Q. All right. Did they come several days apart, or all in one day or separated over a period of time?

A. Over several days after the edition came out.

THE COURT: To set the record straight, I'll quote part of the report that pertains to the complaint and pertains to what your questions are:

"The following action has been taken to date regarding the edition of Hustler magazine. The July issue was brought to the attention of Captain Delau, and since we have received complaints on this publication."

So mention of any complaint, or how this investigation was begun.

MR. FAHRINGER:

Q. Now, when you talked to Mr. Taylor about the July issue with the political cartoons in it, incidentally, you have some written guidelines, don't you, that have been in existence for some, what, four years or so?

A. They're not written, no. That's guidelines that were agreed to by the law department and the prosecutor's office at the — since this unit was initiated.

Q. You've never had any written guidelines?

A. No, sir.

Q. All right. So that there was never any memo or letter or anything of any kind?

A. No. It was an understanding among ourselves when we initiated this unit.

Q. What were those guidelines?

A. It was sexual activity. General genital, male to male, female to female, human and animal or oral genital, anal genital, oral-anal, lesbianism, masturbation-ejaculation, perversion, various depictions of human genitalia, various — bestiality. Those were our basic guidelines.

Q. All right. Now, and that involved explicitness, didn't it, in terms of—

A. Well, it was contact, penetration.

Q. Now, were those guidelines changed at all—

A. No, sir.

Q. —when Mr. Taylor took over?

A. No, sir.

Q. Now, going back to the discussions on Hustler magazine. The July and August issues.

Were those discussions, and the basis for prosecuting these two magazines, reduced to writing by you at all; the reason why it was being prosecuted?

A. The particular Hustler edition was presented to several other municipal court judges—

Q. I'm sorry, Officer. You misunderstood me.

The reason — all I'm asking you was if your report — did you put down any reasons at all on any of your reports why Hustler magazine was being prosecuted, as to what parts were most offen[illegible]e or anything of that sort?

A. This was what the discussion of several judges—

Q. I understood that. I'm only asking about the report. Would that be contained in the report that was before the judges, now, as to why it was being prosecuted or—

A. Yes. The determination had been made by several judges.

Q. All right. And was anything mentioned in the report that had to do with the portions of the magazine that were offensive?

A. Yes. I believe there was some sections, that's in the July edition, which were spelled out as being more offensive than other sections.

Q. Okay. And may I ask you this: Were one of the reasons for prosecuting the July issue, the cartoon that showed three prominent political officials having intercourse with the Statue of Liberty?

A. No, sir. The magazines were viewed from cover to cover and taken as a whole to be obscene.

Q. Did that play a part in it at all, the political cartoon?

A. It was in the magazine.

Q. So it didn't play a part in the prosecution?

A. There was masturbation and ejaculation—

Q. I'm talking about the cartoon?

A. In the cartoon, yes.

Q. So that was part of the basis of the prosecution?

A. One of the guidelines, yes, sir.

MR. FAHRINGER: Judge, may I just, for the record, renew my demand for the record as for the reason why the magazine was prosecuted as going to the heart of this issue. I think to that extent it is relevant now without getting into other parts of the report—

MR. TAYLOR: Judge, I think maybe you should review it to see if there are any inconsistencies that may be pointed out as to the officer remembering which parts he put in his report; and if you don't feel so, and the officer can't remember the report—

THE COURT: The court is still going to deny the report to the defense counsel on the basis that it is a police report and is confidential, and that based upon the testimony being given by the officer, it is not inconsistent with the statement taken here.

MR. CAMBRIA: May I just make one comment, Your Honor?

I'd like to make sure it is understood that we're joining into each other's motions with regard to the Rule 16 question. That even indicates that counsel would have a right to participate in determining whether or not there was inconsistencies, so the record is clear—

THE COURT: You bring up a question that you are joining in motions. Just to straighten it out for the record, we have Bernard Berkman listed as the attorney of record. It is my understanding that Bernard Berkman is not the attorney of record. Is that correct for the purposes of the trial?

MR. FAHRINGER: That's right.

THE COURT: All right. For the purposes of the trial, you represent individuals, or both of you represent the same party or what is the situation?

MR. FAHRINGER: Well, Your Honor, I'm not completely sure, but let me tell you what I think the situation is.

I represent Mr. Flynt—

THE COURT: Which Mr. Flynt?

MR. FAHRINGER: Larry Flynt. Your Honor, Mr. Cambria has represented James Flynt, and I would guess the position here today is that he also represents Althea Flynt.

Now, Your Honor, if there were to be a trial, and we would try them one at a time, we might adjust that—

THE COURT: I understand that. Just as a matter of record so we are not having Mr. Berkman listed here as the attorney of record, and being unfair to him, because it is my understanding he is not the attorney of record—

MR. FAHRINGER: Of counsel—

THE COURT: He has a very limited capacity in this lawsuit.

So the attorneys of record are Mr. Fahringer and Mr. Cambria.

MR. FAHRINGER: With your Honor's permission—

THE COURT: No, no problem. He indicated also that he joined in the objection—

MR. FAHRINGER: I think now, for the record, to make it clear, wherever we urge the point, it is for all of us—

THE COURT: I understand. The court understands that.

MR. FAHRINGER: Fine. Okay.

MR. TAYLOR: Let me make another suggestion. You can ask specific questions of the officer as to what he put in the report, and if the officer can't remember, certainly he is allowed to see his own report for the purposes of recollection.

MR. FAHRINGER: Judge, the only other thing I was going to ask is this — and I welcome that if that helps him refresh his recollection. I was only going to ask if we might have the report marked so just to preserve it as a court exhibit in terms of — in the event—

MR. TAYLOR: Judge, I was going to suggest that I make a copy and provide it to the court so it doesn't get filed with the file—

MR. FAHRINGER: They suggested that procedure in this case, as Your Honor knows, so documents have some way of being identified.

THE COURT: The report we're referring to is the report by Steven Nemeckay to John Schmidt, Sergeant, dated July 2nd, 1976, pertaining to the investigation to the events surrounding the investigation of Hustler

magazine, and the contents of Hustler magazine, and the purchase of said magazine.

MR. TAYLOR: The only thing — we've got some writing on the back that were mine.

BY MR. FAHRINGER:

Q. Now, Officer Nemeckay, just so we're certain, are there any other written reports of any kind relating to this prosecution, the prosecution of the July and August issues of Hustler. Again, Jimmy, Larry and Althea Flynt that have not been produced here today?

A. That would be the arrest report that was made by Patrolman John McNamara.

Q. Would that—

A. That was made out on the 17th when they came up here to Cleveland and were booked in the court, under the first appearance.

Q. And what would that just contain?

A. It would just contain the facts they were here.

Q. Arresting and booking—

A. Appeared in court, and the case was continued.

Q. Anything else you can—

A. No, that would be it.

Q. Now, what about yours? Do you make any notes at all on these investigations, notebook, like where you purchase the magazine, or do you make any notes when you make an inspection—

A. The entries were made here, and the entries were made on the envelope. This was all secured in our evidence locker. The

entries were made in my initial report. Notes were taken at the scene at the time, and the other facts are just circumstantial required in the note-taking.

Q. Now, I might say in that regard these have been given to us. Would you just indicate so we don't have any trouble — what's the indication on the gray bag?

A. This is 10:50 A.M., Friday, 7/2/76, Sam Klein Cigar Company, 1834 East Sixth. Marvin Goldstein was the manager, and it indicates this publication was from George Klein News, 1717 East 30th.

Q. You had it marked pandering obscenity—

A. Yes.

Q. That was just the charge. Can I ask you to read—

A. This one here is 1:05 P.M., 7/4/76, on Wednesday, at 1930 East Sixth Street. Erieview News. Jack Antis, the owner, personally made the sale to me, and the telephone is 771-0240. That he afforded me to contact him by phone.

Q. All right. Thank you.

A. Yes, sir.

MR. FAHRINGER: I don't think I have any other questions.

MR. CAMBRIA: Just a couple of brief questions, Your Honor.

MR. TAYLOR: Judge, before we begin, may I ask your bailiff to make a copy of the report so that you can compare it to make sure it is the same ones. This one has my own writing and notes on the back. That way you could have a true copy. May we do that?

THE COURT: Go ahead.

MR. TAYLOR: If not, I can copy it at the law department when we're done.

MR. FAHRINGER: I don't mind you doing that later.

THE COURT: Okay, Mr. Cambria.

MR. CAMBRIA: Thank you, Your Honor.

EXAMINATION OF STEVEN NEMECKAY

BY MR. CAMBRIA:

Q. Officer, the bookstores, and I believe you indicated that you visited six bookstores in the City, inner city area?

A. In the immediate area, yes, sir.

Q. And any of these bookstores, I noticed that you named some of your guidelines and so on. Did any of these bookstores have any magazines which showed consummated sexual activity, intercourse, anything of those things you listed?

A. At that particular time, I was looking at the July edition of Hustler magazine.

Q. You have been in the stores before?

A. All the stores in the City of Cleveland.

Q. All right. You have been in all those stores on a regular basis, haven't you; is that your job?

A. Not a regular basis. We have certain areas that deal with hard-core obscenity. There are violations of law, and others do not so—

Q. Let me—

A. —periodically, we will check them.

Steven Nemeckay by Mr. Cambria

Q. All right. These East Sixth Street stores, have you been in these stores prior to the day you went there to purchase Hustler, these six stores, had you been in these stores?

A. What is the time period involved?

Q. Ever?

A. Three months, four, yes—

Q. Ever?

A. Yes.

Q. And have you been in there as part — in your official capacity as being with a salacious literature squad, or whatever you call it here?

A. Yes, sir.

Q. When you were in there, did you have an occasion to examine any of the books in those bookstores?

A. At that time, yes, sir.

Q. All right. When you examined these books, did you find any that had any consummated sexual acts?

A. Not to my knowledge. If I did, they would have been brought in as evidence.

Q. I'm not talking about the day you went in there for Hustler, I'm talking about any other time?

A. Prior to that, no, sir, never found—

Q. In all of those six stores?

A. Yes, sir.

Q. Could you just name the other four stores, so we could have those on the record. Aside from the two that you already—

A. Well, we checked the bookstand at Ninth and Euclid. We checked the bookstore at Third and Superior. We checked the bookstore at Sixth and Euclid, and at the Square.

Q. All right—

THE COURT: Just one second, Mr. Cambria.

Just for the gentlemen, they are from out of town. You indicated you checked the bookstore. You are referring to newstands—

THE WITNESS: These are newsstands—

THE COURT: You checked newsstands as differentiated from bookstores?

THE WITNESS: Yes.

MR FAHRINGER: We appreciate that, Your Honor.

MR. CAMBRIA: Thank you, Judge.

BY MR. CAMBRIA:

Q. When you went into these places, is there a section or any area where the so-called men's magazines or books are located?

A. They have all magazines, yes, sir.

Q. Is there a particular section where there is a concentration of, like, Penthouse, Playboy, Oui and a bunch of these others?

A. Not that I—

Q. You mean they're all scattered around?

A. Yes, sir.

Q. But those books are contained, or those magazines are contained in the stores?

A. Yes, they're displayed.

Q. And I take it that they are displayed no differently than the Hustler magazine was displayed that you purchased.

They're all up on a rack somewhere, or something like that?

A. Well, the Hustler was the only one that had a cover on it.

Q. Yes, aside from that. Aside from the cover. They were all lined up on the rack facing the public, is that correct?

A. Most of them do, yes, sir.

Q. Okay. Now, on the day you went in and purchased Hustler, did you just walk right up to the stand and grab Hustler and pay for it and walk out; or do you remember did you leaf through any of the other books or magazines that were there?

A. We had reviewed this original Hustler magazine. Therefore we wanted to see if it was being sold in the City of Cleveland.

Q. Is that the answer to my question that you didn't review any other magazines; you just went right in and purchased Hustler?

A. I was looking for Hustler, at that time, yes, sir.

Q. Okay. So you went in and grabbed Hustler, and you didn't look at any other magazines. You purchased it, and you walked out, is that correct?

A. No, we had a discussion with the manager.

Q. Okay. Did you purchase any other magazines?

A. No.

Q. Did you look at any other magazines?

A. No, sir.

Steven Nemeckay by Mr. Cambria

Q. All right. Now, did you ever, at anytime, instruct any of the retailers or wholesalers or whomever, not to sell Hustler magazine, or that it would be a good idea not to sell Hustler magazine or something like that, you or anyone from your department, to your knowledge?

A. After the seizure of this particular July edition, we had discussions on it.

Q. Who did you go see?

A. Sam Klein at the Sam Klein Cigar Company, and Mr. Antis at Erieview.

Q. Did you tell them not to sell it; is that what you told them?

A. No. No. I told them the magazine was to be taken for judicial determination, and if it was deemed to be obscene, that the sale of it would be a violation.

Q. Didn't you just say that you went there and talked to them after this prosecution began, isn't that what you did?

A. I talked to them at the time I purchased them.

Q. All right. Did you ever contact them after you purchased, or after the time the magazine was prosecuted, and direct them or indicate to them in some way or another that they shouldn't sell the magazine—

A. No, sir.

Q. —Hustler? Never?

A. No, sir.

Q. Did you take any other magazines, and I'm not just limiting this to the day you purchased Hustler.

Have you taken Playboy or Penthouse, Oui, Club, Swank, Genesis, Gallery or any of those magazines for the purposes of

prosecution; have you ever picked any of those up and started building a case prior to the time that Hustler—

A. Myself, no.

Q. All right. Thank you.

MR. CAMBRIA: No further questions.

MR. TAYLOR: Now, Judge, it might aid the court so I would be willing to read from the police report. You have the original that I handed to you, and I have a copy. I would be willing to read the parts up here relating to what the officer put down about the contents. If that would help, I think that would maintain the confidentiality of the rest of the report.

MR. FAHRINGER: I would appreciate that, Your Honor.

THE COURT: Well, I'll tell you, there would be no problem in my opinion if they received a copy up until they were — all right. Do you want to read the one, two, three, fourth paragraph?

MR. TAYLOR: Well, including the third paragraph.

THE COURT: All right. No problem, if you wish—

MR. TAYLOR: Third, fourth and fifth—

THE COURT: All right. No problem if you wish to make a copy of this and just cut off the bottom part. There would be no problem instead of—

MR. CAMBRIA: Thank you.

MR. FAHRINGER: Thank you.

THE COURT: Cut it right off above where it says Mr. Gold.

MR. TAYLOR: How about this—

THE COURT: If you are permitting that, that is your decision. If you're permitting that to go in there.

MR. CAMBRIA: Your Honor, there is just one thing so the record is clear. We'd like to ask the prosecution where we can find the particular Screw magazines that he referred to in the course of the testimony. At least the issue number or something that would be indicated in the file regarding the issue number so we could produce those.

THE COURT: I assume Smut was that the—

MR. CAMBRIA: Screw or—

THE COURT: Smut. Just identify those. Then we would like to make them part of the record. I think that we can procure copies of the issue.

MR. TAYLOR: Okay.

THE COURT: Just give it to the defense, and that will solve that question.

MR. TAYLOR: Okay.

THE COURT: Any questions, Mr. Taylor?

MR. TAYLOR: Mr. Cambria, I took back the report that I had. It has my notes on the back. I gave the Judge a duplicate copy of it.

MR. CAMBRIA: Fine.

MR. TAYLOR: Nothing further, Judge.

MR. FAHRINGER: No questions, Your Honor.

THE COURT: All right. Anything further, Mr. Cambria?

MR. CAMBRIA: Nothing.

THE COURT: You may step down.

MR. FAHRINGER: I think that's all, Your Honor.

THE COURT: All right. I think we have, just for the record, we have made a determination based upon, I think, a motion. The six motions for separate trials, four and six.

If there is to be any trials that the court will grant, separate trials, there need be no — we'll not have any arguments. I don't mean adversely — arguments presented by the defendant. The court will grant separate trials. If there are in fact trials, there will be separate trials; and can we establish a date for trial, if we are going to have any, or would you prefer not to—

MR. FAHRINGER: Judge, if you don't mind, as a matter of fact, I must tell you that I'm going to go back to Wichita—

THE COURT: I don't mean tomorrow.

MR. FAHRINGER: I mean, I was wondering if we could hold that. I'm sure I will be able to accommodate you promptly if there is going to be a trial.

I want, if you don't mind today, at least to fix a date until we get our schedule—

THE COURT: In looking over the schedule, I was thinking of April 21.

MR. FAHRINGER: That's when the trial will be on. The month of April, Judge.

THE COURT: All right. For the sake of our own record, the court will continue this case just for a month.

MR. FAHRINGER: That would be fine.

Closing Remarks

THE COURT: At which time the court will make a ruling upon the motion. Just as a preliminary, I don't know if the court made a preliminary ruling, but the court is prepared to make some preliminary ruling. Mr. Cambria.

MR. CAMBRIA: The only thing I was going to say, Your Honor, if you are going to continue it for a month, perhaps we might be able to acquire this transcript and then submit our brief within the next two or three weeks.

THE COURT: Your discretion.

MR. CAMBRIA: Thank you.

THE COURT: All right. I think the court has already indicated that your challenge on the constitutionality of the section of the Revised Code, that the court, based upon decisions that have been handed down in our Court of Appeals and other pandering obscenity cases, something that defense counsel don't agree with the court. The court feels that the Court of Appeals has made a determination that these sections are in compliance with the requirements of the guidelines of Miller, and together with the Miller guidelines, I believe the Burgun and the Hamling court, it is this court's opinion that given to the jury together with these guidelines of Miller, that that particular section would be constitutional. Therefore, the challenge of the constitutionality based on overbroad and vagueness would be overruled at this particular time.

I would assume you have received the bill of particulars. I have not seen them, and I don't know if you, at this time, feel that we have—

MR. TAYLOR: Judge, don't you have a copy?

THE COURT: Do I?

MR. TAYLOR: Yes, I gave you a memorandum in support, and it has a copy on it.

THE COURT: When was that given to the defendants?

MR. TAYLOR: January 28. The bill of particulars was given to them — sent to them on the 20th of January.

THE COURT: All right. There was a challenge by the defendants on the question of duplicity, did we resolve that matter?

MR. CAMBRIA: No, Your Honor. The position that we have is that the bill of particulars cannot take the place of a sworn complaint and sworn allegations in the complaint. It can't be used to supplement it, and I believe, the authority that we cited in our earlier brief substantiates our position.

THE COURT: Then the court will hold that in abeyance together and look over the bill of particulars to see where we stand—

MR. TAYLOR: Just so you'll have it. Here is a copy of the memorandum, and the bill of particulars is attached on the back. I sent them the—

THE COURT: I'm sorry. I have them.

MR. TAYLOR: I also have the list of witnesses I sent them and all the articles that I gave them in discovery today which I would like the court to have a copy of.

THE COURT: Now, as far as the challenge as to the — I think it was point five. Constitutionally protected and not being obscene under the law.

The court overrules that motion.

So we have left, I believe, your motion on duplicity.

Closing Remarks

MR. CAMBRIA: Sufficiency, duplicity—

THE COURT: Sufficiency is — that's the challenge of constitutionality—

MR. CAMBRIA: No, Your Honor, we have a sufficiency of the complaint, itself, because it lacked any factual specifications.

THE COURT: All right. The court—

MR. CAMBRIA: Then the duplicity and the disjunctive argument that we made, all of those are in that—

THE COURT: All right. The court will hold in abeyance upon the duplicity and upon the question that we discussed, discriminatory prosecution.

MR. TAYLOR: Your Honor, I would—

THE COURT: The court would hope that we would continue this case until, just as a matter of record, not that anybody need be present, so that our clerk's office does not go crazy, we will continue the case until March 31. Would that give you—

MR. FAHRINGER: Yes.

THE COURT: —give you sufficient time to file?

MR. FAHRINGER: Yes.

THE COURT: By March 31, you should have everything possible, and if the court is not prepared to make a decision at that time, we will make one in the — continue for a couple of weeks and make a decision then.

MR. FAHRINGER: Thank you.

MR. CAMBRIA: Thanks, Judge.

Closing Remarks

MR. TAYLOR: Let me make the offer as far as the complaint goes. I would have no objection to amending the complaint to eliminate several of the alternatives which are contained in the complaint as written. All the complaints are worded the same, and they will all be amended the same.

THE COURT: Well, why don't we do this. Why don't you submit to the defendants a copy of the proposed amended complaint, and they'll address themselves to it at the time of filing the brief—

MR. FAHRINGER: I will bring it for the court.

THE COURT: All right. Thank you.

MR. FAHRINGER: Thank you, Judge.

CERTIFICATE

I, Benjamin F. Watkins, Jr., do hereby certify that as such Reporter I took down in Stenotypy all of the proceedings had in said Cleveland Municipal Court in the above-entitled cause; that I have transcribed my said Stenotypy notes into typewritten form as appears in the foregoing Transcript of Proceedings; that said transcript is a complete form of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

/s/ BENJAMIN F. WATKINS, JR.,
Benjamin F. Watkins, Jr., Notary Public
within and for the State of Ohio

My commission expires on August 26, 1981.

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

Case No. 80-420

IN THE

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

Petitioners,

—vs—

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF STATE OF OHIO

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BRIEF IN OPPOSITION OF STATE OF OHIO

QUESTION PRESENTED

Whether the Ohio Court of Appeals and Ohio Supreme Court properly held that Petitioners, Defendants in a criminal action for violation of Ohio Pandering Obscenity statute, were not entitled to dismissal of such action on grounds of alleged unconstitutional discriminatory enforcement and that case should be remanded for trial in Cleveland Municipal Court on such misdemeanor charges.

STATEMENT OF THE CASE

The Supreme Court of Ohio, in an opinion reported as State v. Flynt, 63 Ohio St.2d 132 (1980), affirmed the Cuyahoga County Court of Appeals decision to remand the misdemeanor pandering obscenity charges against the Petitioners for trial.

The case began in June of 1976, when an anonymous citizen sent a copy of the July 1976 issue of "Hustler" magazine to the Cleveland Police Special Investigation Unit and complained about the issue and specifically about a cartoon showing sexual activity between President Ford, Secretary Kissinger, and Vice-President Rockefeller and the Statue of Liberty. Shortly thereafter, the Special Investigation Unit and its Obscenity Investigation Detail received telephone calls from citizens complaining about this issue of "Hustler" and the cartoon. (See Transcript at 49-50, 53-56, 148-49.) These police then investigated whether the magazine was being sold in Cleveland and just what "Hustler" magazine was as far as content was concerned. The police requested a ruling from this attorney, then Assistant Law Director, as to whether the officers of Hustler's corporation could

be charged in Cleveland for the crime of Pandering Obscenity in relation to the July 1976 issue. (Transcript at 48-50, 112) "Hustler" magazine was the only material under investigation at that time, because it was the only one on which complaints were received, but other magazines were investigated after the decision to prosecute "Hustler" had been made. (Transcript at 106-09, 149-50) The July issue of "Hustler" was reviewed by this writer and then the police secured a review of the magazine from several municipal court judges (not including at that time Judge Calandra who later signed the arrest warrants and was subsequently assigned these cases through the court's lottery assignment method). (Transcript at 152)

After the prosecution and the police received opinions from several judges that the magazine was or probably would be found

obscene, arrest warrants were prepared, the magazines needed for evidence of the sale of the July 1976 and August 1976 issues of "Hustler" were obtained by controlled police purchase, and the magazines presented to Judge Calandra for purposes of determining probable cause for issuing the warrants, the Defendants were arrested in July of 1976.

The cases were assigned to Judge Calandra, the Honorable trial court judge who entered the judgment of May 17, 1977, the Defendants were granted leave of court and continuances to allow the filing of pretrial motions and for hearings on the motions, and the hearing on the discriminatory prosecution issue was heard by the court on February 28, 1977. The Defendants were allowed to submit post-hearing briefs and the court issued its Memorandum to Attorneys and entered the dismissal on May 17th.

Testimony at Motion Hearing

On February 28, 1977, The Municipal Court held a hearing on the Motion to Dismiss to take testimony concerning the allegations of defendants of unlawful discrimination. The defense called this attorney, then Assistant Law Director, to the stand first. Upon preliminary questioning, it was disclosed that the City had made approximately 500 arrests which led to prosecutions on films and magazines from Cleveland's "adult" bookstores and theaters. (Transcript at 9-10.) Although most materials were explicit, some cases (perhaps 10%) involved child nudity, female masturbation, and newspapers such as "Screw" and "Smut" which did not involve intercourse or penetration clearly shown. (Transcript at 30-33.)

The prosecutor then summarized his views on "hard-core" from a street sense

and a legal sense, distinguishing the "lewd exhibition of the genitals" option of the "Miller Test" from the street sense of hard-core penetration. (Transcript at 36-42.)

"Hustler" was the first national magazine with a second class mailing privilege which was being prosecuted, but several other of these magazines then became "under investigation". (Transcript at 91-92, see also pages 52 and 134). The decision to bring further prosecutions had not yet been made, "because we're waiting for this case"; and whether those cases would follow, "I don't know. That decision, I can't make alone either."; but, "It's being discussed". (Transcript at 92.) The prosecutor admitted the likeness in "format" of several of these magazines (Transcript at 95-97), but explained the differences between "Hustler" and the others. (Tran-

script at 97-101.)

The defendants in this case were selected as officers of "Hustler" by their listing as such in the magazines (Transcript at 110), and this action followed the request by the police as to whether "Hustler" could be prosecuted in Cleveland. (Transcript at 112.) The role of this attorney in primarily deciding to prosecute "Hustler" after police request, as compared to the further role of superiors which would probably be necessary against other magazines because of the publicity and complexity which arose in this case, was discussed. (Transcript at 115-16.) However, the prosecutor summarized his intent as to prosecuting others as follows: "My decision wouldn't be any different. I would be willing to prosecute anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case."

(Transcript at 117.) Among the considerations are public reaction (Transcript at 117), cost and time expended on certain classes of cases (Transcript at 118), publicity and jury verdict as measures of community standards (Transcript at 118-21).

The prosecution then made an independent statement as if he were asking himself questions, due to the fact that no other prosecutor was present to object or cross-examine, and the prosecutor related the action of the City against several magazines being displayed at the municipal airport. (Transcript at 126.) The prosecution then summarized his decision to prosecute "Hustler" as opposed to any or several others. One reason was the individual judgment of the "Hustler" magazine which was the subject of the complaint. Another reason was the ability to charge the officers of "Hustler" with the misdemeanor,

a tactic not readily available as to the other magazines. (Transcript at 127-28.)

The prosecutor continued with his statement of explanation that a test case on a "nationwide second class mailing privilege magazine" should not start with a local retailer who "like everybody else, has been selling it for years". (Transcript at 134.) Starting a test case against the officers of one of the magazines would be more appropriate, and even though it might attract more attention, the prosecutor was not then familiar with the reputation of the defendants. In fact, the City's case started before the prosecutor even knew about indictments in Cincinnati or elsewhere. (Transcript at 135.)

REASONS FOR DENYING WRIT

Proposition of Law No. 1

IN ORDER TO HAVE CRIMINAL CHARGES DISMISSED ON EQUAL PROTECTION GROUNDS, THE DEFENDANTS MUST

MEET A HEAVY BURDEN OF PROVING CONSCIOUS AND INTENTIONAL DISCRIMINATION.

The Petition presents one issue, that of the legality of the City of Cleveland's effort to prosecute officers of "Hustler" magazine for Pandering Obscenity under R.C. 2907.32, as to its first Reason of Granting the Writ.

First to be considered is whether the Petitioners met their burden of proof upon their Motion to Dismiss in the trial court. It is clear that such is their burden. It must be shown that the prosecution engaged in invidious discrimination amounting to bad faith harrassment based upon an arbitrary classification. Snowden v. Hughes, 321 U.S. 1, 8 (1944); Oyler v. Boles, 368 U.S. 448, 454-56 (1962); State v. Steurer, 37 Ohio App.2d 51, 58-59 (Summit County, 1973).

Before an evidentiary hearing even need be held, Petitioners should have presented

facts sufficient to "raise a reasonable doubt about the prosecutor's motive". U.S. v. Ream, 491 F.2d 1243, at 1246 (5th Cir. 1974); U.S. v. Falk, 479 F.2d 616, at 620-21 (7th Cir. 1973).

The general rule on the defendant's burden is well stated in People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, at 143 (Ct. App. N.Y. 1972):

> [I]t must be borne in mind that one who alleges discriminatory enforcement must meet the "heavy burden" of showing "conscious, intentional discrimination", . . . or a consciously practiced pattern of discrimination. . . . The conscious exercise of some selectivity in enforcement of the law is not in itself a constitutional violation.

This two-part test of selective discrimination is particularly well stated and supported by the recent decision of United States v. Catlett, 584 F.2d 864 (8th Cir. 1978). See also: People v. Mantel, 388 N.Y.S.2d 565 (1976). The late Senior Circuit Judge of the Eighth Circuit, Judge

Van Oosterhout, stated the following standard in a case alleging a selection of the defendant "which penalizes him for exercise of his first amendment rights" because the defendant had "received widespread publicity and notoriety", (Catlett, supra at 866):

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975). See also United States v. Ojala, supra, 544 F.2d at 943.

It is admitted that the City's prosecution of "Hustler" magazine represents the first attempt to test the obscenity law

against the standards of the Cleveland community toward a magazine which is sold nationwide and openly and has a federal second class mailing privilege. This case was begun in 1976, before the conviction of the "Hustler" defendants in Cincinnati and in other states which brought them to nationwide attention. There is a simple reason for the selection of a single magazine to become a test of the law and the jury's judgment of standards. Obscenity cases are special in criminal law in that community standards can change, being "contemporary" for purposes of prosecution, and the class or type of materials subject to trial may change. Cleveland has had a systematic history of vigorous obscenity law enforcement and wishes to test Cleveland's standards of decency against "Hustler" to gauge the level of sexual explicitness or permissiveness the community feels should be

tolerated under the obscenity law.

As pointed out in the Transcript, at 88-102, there are other so-called "adult" magazines on the market. After the decision was made to prosecute "Hustler", many of them have been under investigation, even before the Defendants filed their motions, and will result in action depending on the outcome of this case. (See, Transcript at 91-93, and 115-18). In that sense, this is a "test" case. We are trying to determine if the genre of "men's" magazines has tread beyond the standards for obscenity. "Hustler" was picked not only for convenience of attaining process and jurisdiction against persons responsible for the magazine, but to make a test case against a magazine we felt was more crass and had less saving features than other known "men's" magazines. (See, Transcript at 126-28, and 134 for prosecutor's explanation, also pages 97-102 for

comparison of "Hustler" with others).

Also to be considered, especially in obscenity litigation, is that each title of each magazine, and each monthly or periodical edition of each magazine, must be judged on its own, and any finding has no effect on other titles or editions, except as a deterrent. This Court in Hamling v. U.S., 418 U.S. 87, at 126 (1974), stated that whether a magazine has a second class mailing privilege has no bearing on its obscenity. The Court further noted distinctly that any magazine to be prosecuted must be judged independently and not on comparison to others alleged to be similar. Id., at 125-26.

It was testified also (Transcript at 23, 28-30, 31-34, 37. 40, 46-47, 51-53, 126) that this City has prosecuted other materials which did not show explicit penetration, and took some action against

the magazines mentioned by the defense as other "men's" magazines at our Airport newsstands. This was evidenced on June 3, 1977, when the Mayor of Cleveland barred Hopkins Airport newsstands from selling any magazine, as "inappropriate" under our concession contract, containing "explicit pictures of nudity or explicit descriptions of sexual activity". These magazines included "Penthouse", "Playboy", "Genesis", "Oui", and the other so-called "men's" or "adult" books and magazines. The City once tested the standards for material which is "harmful to juveniles" in a case involving sexually suggestive cartoons. State v. Joseph Ricco, No. 32905 (Cuyahoga County Appeal, July 11, 1974) (unreported).

The Court of Appeals explained the major flaws in the defendants' proof, and held that their burden of proof had not been met. This decision was upheld on the

same ground by the Ohio Supreme Court. See: State v. Flynt, 63 Ohio St.2d, at 135.

Applying the above standards of review, the first Reason for Granting Review is without merit. (The opinions of the Cleveland Municipal Court, of the Court of Appeals, and the Supreme Court of Ohio are included in the Appendix to the Petition for Writ of Certiorari.)

Proposition of Law No. 2

THE COURT OF APPEALS, IN REVIEWING A MUNICIPAL COURT DISMISSAL OF CRIMINAL CHARGES ON DISCRIMINATORY ENFORCEMENT GROUNDS, MUST RULE ON THE SUFFICIENCY OF THE DEFENDANT'S EVIDENCE IN ESTABLISHING UNCONSTITUTIONAL ENFORCEMENT AMOUNTING TO CONSCIOUS, DELIBERATE, AND ARBITRARY DISCRIMINATION, AND IF THE DEFENDANT HAS NOT MET SUCH HEAVY BURDEN TO REMAND FOR TRIAL.

The established general rule in Ohio is that a Court of Appeals has the power to weigh evidence and, on a properly presented question of law, has the duty to

weigh the trial court evidence. State v. De Righter, 145 Ohio St. 552, at 560, (1945); Cooper v. State, 121 Ohio St. 562, at 569 (1930); State v. Petro, 148 Ohio St. 473, at 500 (1947). See also: State v. Smith, 39 Ohio App.2d 190, at 195 (Hamilton County, 1974); and State v. Arrindella, 137 N.E.2d 136 (Per Curiam) (Hamilton County, 1956).

As such, the Court of Appeals is the last resort where the parties have a right to examination into the factual weight of the proof. Kramer v. Toledo & O. C. R. Co., 53 Ohio St. 436 (1895). The Supreme Court has been relieved of the duty to determine as to the weight of the evidence by Section 2953.02 of the Revised Code. State v. Martin, 164 Ohio St. 54 (1955); State v. Strozier, 32 Ohio St.2d 62, 64-65 (1972). The Supreme Court need only determine the legal questions concerning whether the

proper rule of proof and review was utilized by the Court of Appeals. Mentor v. Giordano, 9 Ohio St.2d 140 (1967); Rheinstrom v. Steiner, 69 Ohio St. 452 (1904); Elster v. Springfield, 49 Ohio St. 82 (1892).

The Cuyahoga County Court of Appeals, in this case, was not differing with the Cleveland Municipal Court on the credibility of the witnesses, but was ruling that the evidence presented did not amount to sufficient proof of "deliberate discrimination based on an unjustifiable standard". (Opinion of Court of Appeals at page 5.) This was a question of law and fact which is particularly within the province of the appeals court, as is their proper function.

This standard of invidious discrimination amounting to bad faith harassment upon an arbitrary classification is supported by other authoritative pronouncements on this issue. See: Snowden v. Hughes, 321

U.S. 1, at 8 (1944); Oyler v. Boles, 368 U.S. 448, at 454-56 (1962); Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728, at 730 (1962); State v. Steurer, 37 Ohio App.2d 51, at 58-59 (Summit County, 1973); State v. Keich, 145 N.E.2d 532, at 535 (Mahoning County, 1956); City of South Euclid v. Bondy, 192 N.E.2d 139, at 142 (Mun. Ct. So. Euclid, 1963).

The law on unlawful discrimination has been consistent and strict throughout federal and state court decisions since the Yick Wo v. Hopkins case, 118 U.S. 356, was announced in 1886. The courts have always recognized the legitimate exercise of some selectivity when necessary for testing statutes and standards.

The cases finding illegal and unconstitutional conduct in the discriminatory enforcement have been of the type of malicious, conscious, and continued harass-

ment found in the famous case of Dombrowski v. Pfister, 380 U.S. 479 (1965), where subversive activities and communist control laws were used to suppress black rights movements.

In Snowden v. Hughes, supra at 8, Chief Justice Harlan Stone stated the general rule which is so often quoted:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person [such as a statute which clearly restricts a particular company above] . . ., or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself [such as a city denying laundry licenses to all Chinese applicants and issuing licenses to non-Chinese: Yick Wo v. Hopkins, supra]. . . . But a discriminatory purpose is not presumed . . ., there must be a showing of "clear and intentional discrimination". . . .

This Court later clarified that mere selective enforcement was not unconstitutional enforcement. In Oyler v. Boles, supra at 454-56, the Defendant showed that he was one of six men qualifying for prosecution under a habitual offender law, but was the only one singled out for further action. The Court found that this selection was not an unconstitutional infringement on his rights:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged. (Id., at 456)

From this precedent, many courts have held that any unequal enforcement, to be unconstitutional, must be accompanied by a malicious intent on the part of the prosecu-

tion. See: People v. Pearce, 87 Cal. Rptr. 814, 8 Cal. App.3d 984 (1970); State ex rel. Mulhern v. McHenry, 326 A.2d 132 (Conn. Super. 1974); People ex rel. Jones v. Adams, 350 N.E.2d 767 (Ill. App. 1976); State v. Coutcher, 424 P.2d 865 (Sup. Ct. Kan. 1967); People v. Gillespie, 201 N.W.2d 104 (Mich. App. 1972).

The general rule as to unconstitutional enforcement of otherwise valid laws was also stated in 16 Am. Jur.2d, Constitutional Law, Section 541, p. 930:

> Mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guaranties of equality. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination. Mere laxity on the administration of the law, no matter how long continued, is not and cannot be held to be a denial of the equal protection of the law. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional

> violation of the essential principle of practical uniformity. Some courts have taken the position that in the absence of facts properly pleaded, showing a fixed and continuous policy of unjust discrimination on the part of a municipality, they will not enter on a consideration of the question whether its administration is in violation of the guaranties as to the equal protection of the laws.

In perhaps one of the best researched and clearly reasoned histories on the law of discriminatory enforcement, People v. Utica Daw's Drug Co., 225 N.Y.S.2d 128 (1962), the Appellate Division of the Supreme Court of New York clarified the law as to burden of proof, matters of evidence, and requirements of the law. While remanding for a new trial, the court gave guidance on issues which are most applicable to this "Hustler" magazine case, and which are supported by testimony in the record (See: Transcript at 126-28, 134-36):

> [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is

> unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found. (Id., at 136)

The Court then recommended two excellent and comprehensive articles on this subject: "Discriminatory Law Enforcement and Equal Protection from the Law", 59 Yale Law Journal 354, and "The Right to Nondiscriminatory Enforcement of State Penal Law", 61 Columbia Law Review 1103. These articles were also cited with approval by the court in State v. Steurer, supra at 59.

Courts have evidenced a distinct

restraint in finding unlawful discrimination by prosecutors unless obviously shown to be in bad faith.

A recognized case on this issue pointed to the importance in deferring to prosecutorial discretion and the seriousness of challenging that discretion except under extreme circumstances clearly demonstrated to the court. U.S. v. Cox, 342 F.2d 167, at 171 (5th Cir. 1965), cert. den. 381 U.S. 935.

This appeal involves the prosecution's exercise of discretion in charging the alleged owners and operators of a magazine which has been ruled to be probably obscene. That this magazine is the first of a class of material which enjoys a federal "second class mailing privilege" and is nationally and openly distributed are not valid grounds for dismissal.

An argument similar to this was in-

volved in the case of U.S. v. Raven, 500 F.2d 728 (5th Cir. 1974), and was clearly denounced by that court.

A similar result was reached in Dear Wing Jung v. U.S., 312 F.2d 73, at 75 (9th Cir. 1963), where a defendant, who was being prosecuted for falsifying his identity in his wife's naturalization proceedings, "claimed that the prosecution was illegal and in violation of the due process clause in that he was picked out discriminatorily because of his suspected radical leanings". The court held there was no constitutional violation and deferred to the presumed validity of the U.S. Attorney's discretion.

See also in U.S. v. Sacco, 428 F.2d 264, at 271, cert. den. 400 U.S. 903 (9th Cir. 1970), where the defendant claimed he was denied due process and equal protection in being singled out and relentlessly investigated because of his suspected

complicity in other unrelated crimes.

This rule was also followed in this federal judicial circuit in Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205, at 206 (6th Cir. 1969). See also: Powell v. Power, 436 F.2d 84, at 88 (2nd Cir. 1970); Swain v. Alabama, 380 U.S. 202 (1965); Mackay Tel. and Cable Co. v. City of Little Rock, 250 U.S. 94 (1919); State v. Nixon, 517 P.2d 212 (Wash. App. 1973); Brickhouse v. Commonwealth, 159 S.E.2d 611 (Sup. Ct. Va. 1968).

The rule in Ohio is best stated in the recent case of State of Ohio v. Steurer, supra, 37 Ohio App.2d, at 58-60, the headnote of which states:

> The discretion exercised by law enforcement officials in determining which of several persons to prosecute is not an infringement upon the constitutional rights of those selected so long as there is no unjustifiable standard adopted or arbitrary classification used.

Under these standards of law, the Ohio

Supreme Court and the Court of Appeals were within their province to order a trial to be had. The facts developed at the hearing showed an open and fair disclosure of circumstances by the prosecutor and police. A more candid display of testimony could not have been asked for. The City clearly showed that it wished to begin prosecuting this type of magazine, picked "Hustler" because of its feature of being one of the worst of the lot, and because the true offenders, the financially interested publishers, could be brought before the Cleveland Municipal Court as an example to local retailers and wholesalers as to the tolerance of the Cleveland community for the future.

CONCLUSION

If the city prosecution staff were to prosecute all or several "adult" magazines of this type at one time, the burden in

time and expense would be prohibitive. It seems only reasonable to test our community standards in a rational, deliberate method on a case-by-case basis. Such was the method adopted in this "Hustler" case.

The Petitioners established only preliminary selection, but it was not shown to be arbitrary or capricious. It certainly was not shown to be in bad faith, for purposes of harassment, or for obvious discrimination reasons.

Therefore, the trial court's dismissal of the charges was not based upon sufficient legal justification, the Ohio Supreme Court and the County Court of Appeals were within their province and correct in remanding for trial, and this Court should affirm these decisions and allow this matter to proceed

to trial. The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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No. 80-420

In The

Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a *prima facie* case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the *prima facie* showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness' testimony, contrary to a well-established rule of review, deny the defendant equal protection of the laws?

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ARGUMENT

I — In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed	14
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II — Where an Ohio court, after weighing the evidence presented, including the credibility of the witnesses, determines that a case of unconstitutional discriminatory prosecution has been made and dismisses the criminal complaints, an appellate court errs in overruling the trial court's finding where it makes an independent determination of the witnesses' credibility contrary to that of the trial court, in direct defiance of a well-settled rule of review. 25

Conclusion. 30

APPENDIX A

Text of Constitutional Provisions and Statutes Involved. A-1

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In The

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No. 80-420

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR PETITIONERS

Petitioners LARRY C. FLYNT, JIMMY R. FLYNT, and ALTHEA LEASURE FLYNT pray that the Court reverse the judgment of the Ohio Supreme Court, entered on July 16, 1980, which affirmed the judgment of the Ohio Court of Appeals, Eighth Appellate District, entered February 8, 1979.

The Ohio Supreme Court judgment affirmed the reinstatement of criminal complaints against petitioners for pandering obscenity, which charges had been dismissed by the Cleveland Municipal Court in its decision of May 17, 1977.

Opinions Below

The opinion of the Ohio Supreme Court, dated July 16, 1980, is reported at 63 Ohio St.2d 132 (1980) and is printed in the Joint Appendix (A-17). The opinion and journal entry of the Ohio Court of Appeals, Eighth Appellate District is unreported and is set forth in the Joint Appendix at A-8. The opinion of the Municipal Court of Cleveland, Ohio is unreported but may be found in the Joint Appendix at A-5.

Jurisdiction

Following a hearing held on February 28, 1977 before the Honorable Salvatore R. Calandra in the Cleveland Municipal Court, Cuyahoga County, Ohio, it was ordered that the charges against petitioners Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure Flynt for pandering obscenity in violation of Ohio Revised Code be dismissed because the charges were the result of intentional discriminatory prosecution.

Respondent State of Ohio appealed to the Ohio Court of Appeals, Eighth Appellate District. On February 8, 1979 that court reversed the order of the trial court and remanded the cause to the Cleveland Municipal Court.

Petitioners appealed to the Ohio Supreme Court which affirmed the judgment on July 16, 1980 (63 Ohio St.2d 132). A petition for a writ of certiorari to the Ohio Supreme Court was seasonably filed within ninety days of the date of the state court judgment. This Court's jurisdiction was invoked under 28 U.S.C. § 1257(3). Certiorari was granted on December 8, 1980.

Constitutional Provisions and Statutes Involved

The text of the First Amendment and section one of the Fourteenth Amendment to the United States Constitution are set forth in Appendix A of this brief, along with Ohio Revised Code §§ 2907.01 and 2907.32.

STATEMENT OF THE CASE

On May 17, 1977, the Cleveland Municipal Court granted defendants-petitioners' motion to dismiss the misdemeanor complaints by which they were prosecuted for pandering obscenity in violation of Section 2907.32 of the Ohio Revised Code (A-5 - A-7). The subject of the prosecution was the widely read, nationally known and distributed (A-85) magazine, *Hustler.** The basis for the trial court's ruling was its agreement with petitioners' well-supported argument that the "complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment" (A-5).

The dismissal was based upon an evidentiary hearing conducted on February 28, 1977, during which the trial judge had the opportunity to observe and evaluate the testimony of Bruce A. Taylor, the assistant law director who had been in charge of Cleveland's obscenity prosecutions for two years (A-31), and of Steven Nemeckay, a member of the Cleveland Police Department's Bureau of Inspection, Special Investigations Unit, obscenity detail (A-116).

Obscenity Control in Cleveland under Taylor

Assistant Law Director Taylor** testified that since the Mayor's police unit on obscenity was formed in April of 1973, the city had launched between 500 and 550 obscenity prosecutions (A-32). Materials were selected for prosecution for the most part upon instructions given to the police by witness

*Neither the retailers nor the distributors were charged but instead, Columbus-based publisher Larry C. Flynt, and editors Jimmy R. Flynt and Althea Leasure Flynt were arrested.

**During the past four years, Taylor has been directly involved in obscenity prosecutions for Cleveland, first as a law student, then as an assistant prosecutor, and finally as the assistant law director in charge of all obscenity cases (A-31).

Taylor in his capacity as the exclusive prosecutor of obscenity cases (A-34, A-126). His specific directives to the police were that applicable Supreme Court decisions prohibited the sale of "obscenity which is hard-core" (A-34). He "defined to them what [he] thought hard-core meant" (A-34). This definition referred to "actually [sic] instead of simulated acts of sex, and where ejaculation et cetera, is shown . . ." (A-35). Accordingly, enforcement concentrated on "what we call adult bookstores and theaters" where hard-core materials are purchased (A-35).

At Taylor's direction, the police were to seize the "most explicit of the material available" (A-36). Explicit meant "actual photographs of penetration where it is clearly shown and not just in position" (A-36) or bizarre depictions of "bestiality, . . . masochism, bondage and sadomasochism" (A-36), all of which had "sexual conduct clearly shown" (A-37).

Authority to establish prosecutorial guidelines had been delegated to Taylor by the chief prosecutor (A-31, A-38, A-53, A-56), and the police implemented Taylor's instructions (A-36). During Taylor's two years as supervisor of obscenity prosecutions, there had been no actions initiated against paperback books or unillustrated materials (A-37, A-38). Consistent with his well-established guidelines, virtually every prosecution involved works displaying explicit sexual activity (A-45). Moreover, practically every publication* contained more than mere frontal nudity (A-81). In a startling admission, witness Taylor acknowledged "[w]e had never prosecuted a magazine like *Hustler*" (A-81).

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*The exceptions to the rule of prosecuting only hard core publications were a magazine containing nude photographs of children, which would of course constitute a violation of a different section of the Ohio Code [§2907.31] (A-48), and vague allusion to a newspaper format publication called *Screw* which the witness could not recall showing actual penetration (A-43, A-54).

Hustler Magazine

The proof at the hearing demonstrated that *Hustler** follows the format and basic philosophy of as many as 50 or 75 nationally known men's or adult magazines sold in Cleveland, such as *Playboy*, *Club*, *Penthouse*, *Gallery*, *Genesis*, *Oui*, *Cavalier*, *Swank*, *Stud* and *Dude* (A-83—A-85, A-87, A-106). An inspection of the publication itself will reveal that *Hustler* contains editorials, motion picture reviews, feature articles, contemporary fiction, interviews and special commentaries dealing with various sexual subjects. The magazine publishes pictures of women in the nude with genitals fully exposed, but, as testified to by witness Taylor, there are no pictures of explicit sex acts so as to bring *Hustler* squarely within the precincts of Taylor's well-formed prosecutorial policy (A-62).

Taylor testified at some length concerning the content of the July, 1976 issue of *Hustler* (A-61—A-82) notwithstanding that he had not read the magazine carefully but had just briefly scanned it (A-63). (He acknowledged that the August 1976 issue was similar [A-93].) Taylor conceded that he had told a television interviewer that the prosecution was launched because of a political cartoon which was the subject of complaints to the police about " 'what they're doing to our president' " (A-55, A-59.** Later, Taylor altered this version, denying that petitioners' charges arose out of that cartoon, but was forced to admit that he had publicly indicated the cartoon was the main reason the magazine had been singled out for prosecution (A-60). Moreover, he confessed that a depiction of Uncle Sam with

*The July and August 1976 issues which were the subject of the prosecution were identified before the court during the hearing, and the witness testified as to what he could see in the magazine (A-61—A-78); curiously, however, at the prosecutor's request, they were not marked as exhibits.

**The cartoon consisted of President Ford, Henry Kissinger, and Nelson Rockefeller attempting to do rude things to the Statue of Liberty, obviously without her consent (A-55).

his pants down contributed to the decision to prosecute, but only because of the nudity in the cartoon (A-67). Thus, because of the political cartoon, the magazine was "turned . . . over to the officers in the smut squad. . . [and then to Taylor to see] . . . if they could make a case out of it" (A-55, A-56).

Taylor found the July, 1976 issue of *Hustler* to contain many features, cartoons, pictures and stories which of themselves were not obscene (A-70, A-72, A-74, A-75). For example, he acknowledged that an interview with Althea Leasure, similar to those found in any prominent magazine, "didn't seem to be sex-oriented" (A-63). However, he pointed to "dirty jokes" (A-76), pictures of dolls with sexual organs (A-77, A-78), a cartoon showing simulated sexual intercourse (A-78, A-79), and exhibitions of genitals (A-79) as supporting his determination that the magazine, taken as a whole, was obscene (A-79). Nevertheless, Taylor candidly admitted that he had never prosecuted magazines devoted solely to frontal nudity (A-80, A-82), exclusively to stories dealing with sex (A-82), only to cartoons (A-82), or solely containing reviews of X-rated materials (A-82, A-83).

When asked to compare *Hustler* with similar national men's magazines widely sold throughout the area, the prosecutor agreed that the other publications, like *Hustler*, contained pictures of nude women with exposed genitals (A-87, A-88), stories with sexual content (A-88), and advice columns answering readers' questions about sexual problems (A-88). He concurred that *Hustler's* format was akin to those of the other magazines (A-88). However, Taylor indicated that some of the other magazines, i.e. *Club* and *Gallery*, depicted scenes of simulated sexual intercourse, which representations were not found in *Hustler* (A-88), and thus, were more sexually explicit.

The testimony further established that articles on the various sexual aberrations mentioned in *Hustler* also appeared in these other magazines (A-89). Similarly, excluding *Playboy*, Taylor

acknowledged that the other magazines were "comparable to *Hustler,*" and that the pictures were "pretty much the same" (A-88, A-89); that, in fact, at least Club's pictures were "stronger" (A-90).

Although he was not qualified as an expert on the subject of English literature, the witness nevertheless offered his untrained view that the stories in *Penthouse* "seem to be a little better written as far as literary words" (A-90), but insofar as content, the *Penthouse* stories "still describe the same thing . . ." (A-90).

Essentially, the prosecutor's differentiation between *Hustler* and the other nationally distributed men's magazines merely rested on his opinion that *Hustler's* jokes were more "shocking" (A-89), its stories "less well written" (A-90) and of "lower mentality" (A-90), and its cartoons more sexually oriented (A-92).

Calculated Nonenforcement Against Similar Magazines

The singular most important revelation of the February 28, 1977 hearing was that Assistant Law Director Taylor had initiated criminal (A-97) and civil (A-95) proceedings against only *Hustler* magazine but none of the other men's magazines widely available in the Cleveland community.* The record established that the police and the prosecutor's office knew of

*Prior to the hearing, the City of Cleveland had not only commenced criminal prosecution against petitioners, it also had brought a civil injunction suit against *Hustler* in the Cuyahoga County Common Pleas Court (A-95). Taylor's office expressly threatened retailers that if *Hustler* were determined to be obscene, its sale would be a violation of law (A-137). A letter was sent by the prosecutor's office to the George Klein News Co., distributor of *Hustler*, advising of the city's intention to prosecute the dissemination of the magazine (A-94, A-95). No mention was made of any threatened action regarding any other magazine (A-95), and as well no steps to obtain an injunction were taken as to any of the other "comparable" publications (A-95).

and actually examined other magazines (A-96), but did not open any files on them (A-96, A-97), or take any steps whatsoever toward prosecution of them (A-96). There were no seizures of other magazines (A-97), and Officer Nemeckay, who also testified, conceded that he had not even started steps preliminary to such action (A-137, A-138). The Assistant Law Director tried to dispel the blatant appearance of selective enforcement against *Hustler* by weakly claiming that the decision on possible future prosecutions of similar national magazines was yet to be made (A-86), and that it may not be his to make. This last minute explanation flew directly in the face of his former assertion that he was delegated and possessed the authority to determine the publications his office prosecuted (A-38), and that all the officers ultimately came to him and he alone approved and guided each prosecution. Indeed, the record is replete with testimony supporting the inescapable conclusion that it was Bruce Taylor who chose to prosecute petitioners for "pandering" *Hustler* (A-31, A-38, A-53, A-56), and at no time did he claim any sort of participation or consultation regarding his decisions in this area from any other authorities.

The prosecutor attempted to justify the obvious difference in treatment by his office of *Hustler* and comparable men's magazines, none of whose editors and publishers had been arrested, solely on the basis of the location of *Hustler's* corporate headquarters in Columbus, Ohio (A-109, A-110). This explanation, however, was thoroughly at odds with the admitted uniform practice of Taylor's office: to prosecute the *retailers* and *distributors* as opposed to the editors or publishers. This established practice was followed in the more than 500 previously prosecuted obscenity cases, irrespective of the fact that the magazines were published out-of-state, since in all prior cases the publication was admittedly the gravamen of the complaint (A-33, A-110, A-111). Yet, in the instant prosecution Taylor ignored all of the other individuals who were selling all

of the other comparable magazines, and concentrated solely on *Hustler* and its employees.

The Assistant Law Director confessed that "public reaction" and "what the community feels about what we're doing" were factors in his decision of whether to prosecute *Hustler* or other magazines (A-102—A-104). However, he feebly attempted to explain away these remarks by stating that publicity causes the cases to be more "drawn out" (A-103). Since this "explanation" offered little insight into the reasons a specific magazine was chosen for prosecution, the prosecutor was then asked:

> "Q. So in other words, if you're going to make this future determination regarding these other magazines, you're going to be looking at other things other than just what the content of the magazine is; you're going to be looking to what is going on around you, and how people react to the prosecution?" (A-104).

Returning to his original statement on public sentiment, he acknowledged:

> "A. Certainly, that is a thing that has already taken place. It's already been considered" (A-104).

The Trial Court Decision

The trial court judge, after weighing all of the evidence, hearing and observing the witnesses, and assessing their credibility, found that:

(1) Cleveland's obscenity prosecutions were based on guidelines limited to hard-core pornography (A-6);

(2) The magazines prosecuted to date were sold only in "adult" book stores (A-6);

(3) Other magazines generally available throughout the community contained some hard-core material and yet were not prosecuted (A-6);

(4) *Hustler* did not contain hard-core material (A-6);

(5) Other magazines similar to *Hustler* were actually available at the same locations but were not being prosecuted (A-6).

The trial court did not attach significance to the fact that this was the "first prosecution of this type of magazine or of this type of defendants" (A-6). However, the court specifically noted on the date of its May 17, 1977 decision that "no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976" (A-6). Indeed, as if foretelling the case's ultimate destiny to this Court, the trial judge recognized that:

> "If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to select and prosecute this magazine only, presents a serious constitutional question" (A-6).

The charges were dismissed on the trial judge's amply supported finding that the proof clearly established petitioners' allegations of discriminatory prosecution.

Ohio Court of Appeals Opinion

On February 8, 1979, the Court of Appeals of Ohio, Eighth District, sitting in Cleveland, reversed the trial court's order granting petitioners' motion to dismiss the criminal charges and remanded the case to the Municipal Court (A-8—A-16). The court of appeals determined, based upon its own selective reading of the record, that petitioners had not met their burden of proving unlawful discriminatory prosecution. In ignoring the prosecutor's own admission that petitioners' publication had been singled out because of an immodest political cartoon about which complaints had been received, the court instead chose to believe the Assistant Law Director's excuse for salvaging the charges that the prosecution was a test case. In fact, in attaching such significance to this unsupported remark, the court's

decision became an enigma in view of its later statement that "[i]t is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present" (A-13).

Moreover, Taylor admitted that all phases of obscenity prosecutions were "exclusively, in [his] jurisdiction for the past two years" (A-31), that the Chief Prosecutor delegated the decisions on whether to prosecute to his discretion (A-38), that Taylor had personally decided to prosecute *Hustler* (A-56, A-102), that the police are guided by his interpretations of the law (A-34, A-53, A-118), and that the police rode "on [his] determination and judgment" (A-35). Nevertheless, the Ohio Court of Appeals held that petitioners should have "presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format [as *Hustler*]" (A-14), apparently because of Taylor's one ambiguous and contradictory claim that he could not make the decision on whether to prosecute other similar magazines (A-86). As a result and even though Taylor never otherwise even hinted that he had other than a free rein regarding all aspects of such prosecutions, the Court of Appeals found that petitioners failed to present plenary proof that other magazine publishers would not be prosecuted, and thus had not met their burden of proof rather than shifting the burden to the prosecution to rebut the petitioners' case.

Ruling of Ohio Supreme Court

Petitioners appealed to the Ohio Supreme Court, which on July 16, 1980, over the vigorous dissent of Hon. Paul W. Brown, rejected petitioners' argument that after having presented a *prima facie* case of discriminatory prosecution, the burden should have shifted to the prosecution to rebut that

showing (A-17—A-23). The Ohio Supreme Court accepted the prosecutor's unsupported claim that the *Hustler* prosecution was a test case (A-21, A-22). In ignoring Taylor's testimony that he had sole discretion in what obscenity cases he prosecuted (A-22), the court wrote:

> "In order to sustain their burden, the defendants [petitioners] needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions" (A-23).

In a sturdy and well-reasoned dissent, Justice Brown found that "the defendants [petitioners] sustained [their] burden [of demonstrating intentional discrimination] and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact . . ." (A-23). For example, he noted that:

> "Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. . . . When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors — this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler. Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons" (A-24).

Based upon this complete reading of the record and not the "selected" reading adopted by the majority to support the prosecutor's claimed "test case" camouflage, Justice Brown declared:

> "In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, im-

> properly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present" (A-24, A-25).

Justice Brown found proper the trial court's inference of discriminatory intent based upon Taylor's testimony that petitioners were prosecuted because of unfavorable public reaction to *Hustler* (A-25, A-26). He also quite properly noted that "[t]here are also indications that the prosecution was brought to chill the defendants' First Amendment rights" (A-26).

Petitioners' writ of certiorari to the Ohio Supreme Court was granted on December 8, 1980.

Summary of Argument

Petitioners established that the main reason prosecution was commenced against their magazine, which contained presumptively protected material, was public disagreement with a politically controversial cartoon. They also proved that the individual customarily and admittedly vested with exclusive authority to conduct obscenity prosecutions veered from his own established and practiced guidelines to initiate this prosecution based upon such adverse public reaction. Also substantiated was the fact that this prosecutor failed to institute any action whatsoever against known publications of a similar nature. Thus, a *prima facie* case of discriminatory enforcement was demonstrated.

This showing of a *prima facie* case required the prosecutor to come forward with evidence which was solely within his control, rebutting petitioners' proof of intentional selective enforcement. Since the prosecution adduced no rebuttal evidence, the

criminal charge was properly dismissed in accordance with the Fourteenth Amendment's equal protection clause.

Moreover, it was error for an appellate court to disregard specific findings of fact in direct defiance of established Ohio law. In so doing, the Ohio Supreme Court impermissibly shifted the burden of proof to petitioners in contravention of the due process clause.

ARGUMENT

I

In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed.

This case presents the Court with its first definitive opportunity to hold that a state's obscenity prosecution of a presumptively protected national adult magazine, while purposefully exempting similar publications from criminal charges, is unconstitutionally discriminatory. The record made of the examination of the Cleveland Assistant Law Director, who had exclusive delegated authority as to obscenity prosecutions, reveals that the act of choosing to prosecute *Hustler* Magazine was the product of unlawfully discriminatory motivations admittedly spawned by "official" and public disapproval of a political cartoon brought to the attention of the Cleveland Police Department. The seeds of a major constitutional controversy were imbedded in the February 28, 1977 hearing and at that very moment, the case was destined to reach this Court. Taylor's testimony confirms that the prosecutor's office

responded to community complaints about the political content of *Hustler* and that he impermissibly made citizen reaction the basis of his prosecution.

As shown by the prosecutor's wavering testimony on the reasons for instituting the criminal suit, the prosecution of *Hustler* was not a "test" case. Respondent's action amounted to purposeful and thus illegal discriminatory prosecution. Petitioners established a *prima facie* showing of patent enforcement differential embarked upon in the absence of a valid explanation by the state and which prompted the trial court to properly dismiss the charges. Although the prior warnings of our federal courts to state prosecutors were thought to be more than adequate, apparently further instructions are needed.

Any constitutional evaluation of this issue must be made against the backdrop of the Fourteenth Amendment and those decisions by this Court that have condemned discriminatory enforcement of criminal laws. *Oyler v. Boles*, 368 U.S. 448 (1962); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Few words sound so familiar as those from the imperishable *Yick Wo* decision:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (*Id.* at 373).

It is recognized, however, that in order for selective enforcement of the law to be construed as an unconstitutional discrimination, the discrimination must be "intentional or purposeful". *Snowden v. Hughes*, 321 U.S. 1 (1944). It is also clear that although the discrimination must be shown to be "purposeful", malice, in the sense of personal ill-will toward the

victims of discrimination, need not be demonstrated. *See* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 *U. Ill. L.F.* 88, 90-96.

Discriminatory selection of persons for prosecution has been equated with prosecution "based upon such impermissible considerations as race, religion, or the desire to prevent [their] exercise of constitutional rights." *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). In those cases in which the defendant alleged discriminatory application of criminal laws against him, and in which the courts have specifically addressed the question of whether the alleged basis of selectivity was arbitrary or invidious, the courts have held that where one of the reasons "for the selection of the defendant for prosecution was based upon his exercise of his constitutional rights. . . [such selection] was made on an invidious basis." Annot., 95 A.L.R. 3rd 280, 288, 302 (1979). *See also United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973). Accordingly, discriminatory enforcement has been recognized as a defense in the selection of vocal draft counselors for prosecution under selective service laws, *Falk*, *supra;* in the asserted use of tax laws selectively against tax protestors, *United States v. Oaks*, 508 F.2d 1403 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976); in the application of wiretapping statutes to a private detective, *United States v. Robinson*, 311 F.Supp. 1063 (W.D. Mo. 1969); in the enforcement of Blue Laws selectively against non-union shops, *People v. Tornatore*, 46 Misc.2d 908, 261 N.Y.S.2d 474 (Poughkeepsie City Ct. 1965); and in the use of traffic laws to impede unionization, *Murguia v. Municipal Court for Bakersfield Judicial Dist.*, 15 Cal.3d 286, 540 P.2d 44, 124 Cal.Rptr. 204 (1975). *See also United States v. Cammisano*, 546 F.2d 238 (8th Cir. 1976) (discrimination based on national ancestry).

In none of the cases in which the discriminatory enforcement defense was acknowledged and accepted was anything more

required than proof of purposeful discrimination based upon an impermissible consideration.*

Curtailment of Exercise of First Amendment Rights

Federal appellate courts have recognized that discriminatory enforcement of laws in a manner which curtails First Amendment rights is especially pernicious:

> "[T]he Supreme Court has stated, 'It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups whether by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system *by selective enforcement of an extremely broad prohibiting statute*' " (*United States v. Crowthers*, 456 F.2d 1074, 1080 [4th Cir. 1972]; emphasis supplied).

Moreover, it is well recognized that when the government selectively chooses to prosecute only those individuals who have exercised their First Amendment rights by, for example, speaking out against government policies or by expressing an unpopular view of society, an informal system of prior restraint is created. There exists a strong presumption against the constitutional validity of such a system. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1930).

In the 1960's prior restraint was found in the massive confiscation of books. *A Quantity of Copies of Books v. Kansas*, 378

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*Indeed, *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (4th Dept. 1962), accepted by the courts below as persuasive authority for the principle of selective discriminatory enforcement, recognized that purely *arbitrary* enforcement, even though not directed to inhibiting the exercise of constitutional rights, also vitiated prosecutions.

U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). In the seventies it was seen in the unauthorized seizure of magazines and films. *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973). Today we are faced with the spectacle of intentional discriminatory prosecution, which is fast becoming the chief impediment to a free distribution of the embodiment of protected ideas. *See, e.g., Penthouse International Ltd. et al. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

Burden of Proof

Although it may ultimately rest with the defendant to prove discriminatory enforcement, when purposeful discrimination is shown, even where serious crime is involved, the "People [prosecution] must demonstrate a compelling interest that necessitates the discriminatory enforcement of serious criminal statutes . . .; in other words, the People would be required to show the necessity of singling out for discriminatory treatment only a portion of those who commit serious crimes." *Murguia v. Municipal Court, supra*, 124 Cal.Rptr. 204, 216 (1975).

Even though the *final* burden of persuasion concerning discriminatory enforcement lies with the defense, recent authority holds that a mere threshold showing of discrimination by the defense shifts the burden of going forward to the prosecution. *See, e.g., Falk, supra* at 624; *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); *United States v. Steele*, 461 F.2d 1448 (9th Cir. 1972). The necessity for this approach was suggested in the Illinois Law Forum article wherein the author states that:

> "Rather than requiring a defendant to prove the prosecutor's knowledge and motivation in order to establish a denial of equal protection, a court should hold that the burden of going forward shifts to the state once the defendant proves that only a few of the knowable

> violators of a law have been prosecuted or that the group prosecuted for violating a law differs from the group not prosecuted in characteristics irrelevant to law enforcement purposes. Only after the state explains what has produced the unequal treatment can the court determine whether the selective enforcement results from the application of unjustifiable or arbitrary enforcement criteria" (*Id.* at 106).

Upon similar reasoning, it has been held that:

> "[W]here it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence. . . . It is neither novel nor unfair to require the party in possession of the facts to disclose them. Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1961). We think defendants made a sufficient prima facie showing. . . and that the government, being in possession of the facts. . . should have come forward with evidence of a doubl standard" (*Crowthers, supra*, at 1078).

In accord are the observations of the court in *Falk, supra:*

> "It is, of course, possible that . . . the government changed its policy on nonprosecution. However, in view of its admitted policy not to prosecute prior to that decision we believe that in the particular circumstances of the instant case *it was incumbent upon the government to come forward* with evidence that it had in fact changed its policy generally or otherwise to explain why Falk was being singled out for prosecution in contravention of the government's own procedures" (*Id.* at 621; emphasis supplied).

Adopting these well-reasoned and widely accepted rules to this case, the conclusion is inescapable that petitioners readily established a more than sufficient basis for an inference of unjustifiable discrimination adequate to shift the burden to the prosecution. Indeed, in their motion to dismiss the charges of

pandering obscenity, petitioners alleged grounds supporting their claim that the Assistant Law Director had illegally singled out *Hustler* for prosecution while exempting other comparable national men's magazines. Based upon these well-founded allegations of denial of equal protection, the Cleveland Municipal Court granted petitioners an opportunity to examine the sole official charged with the responsibility of initiating obscenity prosecutions for the City of Cleveland. Despite the prosecutor's attempts to qualify his statements and retract his earlier public remarks, the following conclusions can be drawn from the hearing transcript:

(1) The Assistant Law Director possessed and consistently exercised the exclusive authority to determine whether or not to commence all obscenity prosecutions;

(2) At the time of the arrest, the publisher and editors of *Hustler* were the *only* targets of the prosecutor's obscenity enforcement program;

(3) No other national men's magazines were the subjects of any such charges, and none of these magazines to date had even reached the most preliminary stages of investigation;*

(4) *Hustler's* publisher and editors were arrested, even though the prosecutor's office's policy in the past had been to charge solely the local retailers and distributors;

(5) The prosecutor had received complaints from the community regarding a constitutionally protected cartoon found in one issue of the magazine and began his quest for charges from there;

(6) The Assistant Law Director had publicly stated that *Hustler's* publishers and editors had been chosen for

*In fact, although Taylor attempted to claim that the others were under "investigation" for prosecution, continued probing forced him to admit that the sum total of that "investigation" consisted of awareness of the existence of these other magazines but no formal steps were taken to even open an investigative file on them (A-96, A-97).

prosecution as the result of the local citizens' disapproval of the cartoon.

Furthermore, the testimony revealed that the sexual content of *Hustler* is no more explicit than that of the other magazines of its genre, milder than at least one of the others and the issues upon which the charges were brought contained articles and features which were not even sexually oriented (A-63, A-70, A-72, A-74, A-75, A-87—A-89, A-90). *Hustler* emerges as a magazine that takes an irreverent attitude toward institutions of government, including national political figures (A-55), the Statue of Liberty (A-55), and a prosecutor (A-67). The prosecution was admittedly commenced by witness Taylor (A-56, A-102) because of an irreverent political cartoon (A-54, A-59, A-60) and witness Taylor testified that "publicity" and "public reaction" played a part in the process of selection (A-102—A-104).

The burden upon the prosecutor in the present case should have been no less than that upon the United States Attorney in *Falk, supra,** in view of Taylor's actions in prosecuting only the publisher and editors of *Hustler* while ignoring magazines of the same tenor. When dealing in the delicate First Amendment

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*After reviewing the evidence adduced by *Falk*, the Seventh Circuit concluded:

> "The unrebutted evidence before the court, including the admission of the Assistant United States Attorney and the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a *prima facie* case of improper discrimination in enforcing the law. . . . In accordance with our holding that a *prima facie* case has already been presented, and in agreement with United States v. Crowthers, *supra*, however, the burden of going forward with proof of nondiscrimination will then rest on the government. Particularly with regard to the seemingly inherent discrimination against Falk in prosecuting him for insisting on his claim as a conscientious objector, *we think the government will be required to present compelling evidence to the contrary if its burden is to be met*" (479 F.2d at 623, 624; emphasis supplied).

area, an elected prosecutor — or an assistant who receives his delegation of authority from one holding elective office — is tempted to take the popular approach to questions of community concern. Yet, as noted by the trial judge in this case (A-104, A-105), the prosecutor does not take into account citizen reaction every time he initiates criminal charges, especially when that reaction is composed of displeasure with the contents or method of presumptively protected speech.

Thus, despite the witness' protestations to the contrary, the trial judge, who was in a position to assess the materials, as well as the credibility of the witnesses, clearly concluded that, at least *prima facie*, the magazine's manner of exercising its First Amendment rights (which apparently irritated some members of the public) and arbitrary considerations of public reaction were at least part bases for prosecuting *Hustler* alone among the magazines of its ilk. Under the circumstances of this case, where First Amendment rights arguably were at stake, and where ample evidence had been presented to demonstrate, *prima facie*, that discriminatory prosecution, initiated by the witnesses, had occurred, the Ohio Court of Appeals and Ohio Supreme Court erred by placing the burden on petitioners to show not only that *Hustler* alone had been prosecuted, but that only *Hustler would be* prosecuted. Rather, the two appellate courts below should have held that it was incumbent upon the prosecution to produce evidence, of which it alone would have knowledge, to rebut the showing that *Hustler* had been discriminatorily singled out for prosecution. In light of the evidence produced by petitioners from which it properly could be inferred that no other magazines of *Hustler's* genre would be prosecuted, the state, in order to avoid a finding of discriminatory prosecution, should have been required to produce rebuttal proof.

In this vein, the words of the Seventh Circuit in *Falk*, *supra*, carry an important message:

> "[W]e wish to note our disapproval of the apparently frequent, and often too easy, practice of simply dismissing

> all allegations of illegal discrimination in the enforcement of criminal laws with a reference to Oyler v. Boles, *supra*, and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution. *That correct principle does not in many cases answer the question whether selective enforcement in a given case is invidious discrimination which cannot be reconciled with the principles of equal protection.* As Judge Cummings reminded us in Stamler v. Willis, 415 F.2d 1365, 1369-1370 (7th Cir. 1969), cert. denied, Ichord v. Stamler, 399 U.S. 929, 90 S.Ct. 2231, 26 L.Ed.2d 796 (1970), '[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government' " (*Id.* at 624; emphasis supplied).

We are confident that the Court will not be able to read the revealing record in this case and dismiss the blatant prosecutorial discrimination as mere discretion in the exercise of prosecutorial resources, especially when other vital issues are at stake, and when it quite clearly appears, as Justice Brown noted below, that only a "selective" reading of the transcript can support the Ohio Supreme Court's decision.

Our whole constitutional heritage rebels at the thought of selective enforcement of the criminal laws for it is a handy implement for disguised persecution of nonconformists, making them victims of prejudice and public excitement. Discriminatory prosecution represents an alarming trend in the law today which exemplifies the inequality of the litigating position between the state and even the most resourceful defendant, much less the vast majority of those in less fortunate circumstances. Even more important, however, is that this type of police conduct has an anguishing impact upon the exercise of First Amendment rights, which can all too easily be chilled and if the state's power is not checked, totally curtailed.

All that stands on the frontiers of the First Amendment to protect us from the ruthless discriminatory conduct of law

enforcement officials is a firm rule prohibiting singling out those like petitioners, who have reached the borders of free expression. The decision of the trial court holding that the activities of the prosecutor in arresting petitioners amounted to intentional discrimination based upon a wholly arbitrary classification is a giant step toward stamping out official lawlessness in the delicate area of prosecution of presumptively protected material. We look to this Court to establish a firm rule for the entire country that where a criminal defendant has made out a *prima facie* case of discriminatory prosecution, the burden shifts to the government to come forward with evidence sufficient to rebut the defendant's showing, especially where the government has a monopoly on the facts. In so doing, the Court will do much to insure the safety of the exercise of constitutional rights no matter how controversial or unpopular.

II

Where an Ohio court, after weighing the evidence presented, including the credibility of the witnesses, determines that a case of unconstitutional discriminatory prosecution has been made and dismisses the criminal complaints, an appellate court errs in overruling the trial court's finding where it makes an independent determination of the witnesses' credibility contrary to that of the trial court, in direct defiance of a well-settled rule of review.

The courts below held that petitioners failed to sustain their burden of proof as to the intent to discriminate against *Hustler* because they failed to present evidence that *Hustler* alone would be prosecuted.* In reaching this conclusion, both courts ignored the well-settled principle that a trier-of-fact's determination of the credibility of a witness is entitled to great weight on appellate review. Indeed, this has been the law in the State of Ohio for over 106 years, since the Ohio Supreme Court stated in *Landis v. Kelly*, 27 Ohio St. 567 (1875), that:

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*In his dissenting opinion, Justice Brown of the Ohio Supreme Court pointedly disagreed:

> "[T]he Court of appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.
>
> "It is well settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in every reasonable presumption in favor of findings made by the court below as a basis for its decision. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See *Brescoll v. Nationwide Mut. Ins. Co.* (1961), 116 Ohio App. 537, 543, 189 N.E.2d 173; *Thayer v. Shorey* (1934), 287 Mass. 76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle" (A-23, A-24).

> "When, in the trial of an action, a conflict of testimony is manifest, especially when a witness has a deep interest involved in the action, . . .one of the surest tests of truth . . . is derived from a careful scrutiny of the witness while under examination. Where that test is wanting, and the conflict in the testimony is clear and very considerable, the reviewing court must investigate at a great disadvantage, and will always hesitate, where no clear preponderance of evidence appears to favor the claim of the plaintiff in error, to reverse the finding and judgment of the trial court" (*Id.*, at 571, 572).

In the instant case, the only evidence offered by petitioners or the state was the testimony of witnesses Taylor and Nemeckay. The trial court, sitting as trier-of-fact, was able to observe the demeanor of the witnesses while they were questioned and to hear the inflection and emphasis given by them to words and phrases. Because Taylor and Nemeckay were the very persons who were closely involved in prosecuting *Hustler*, they could not be expected to offer direct admissions of discriminatory prosecution. The credibility of their answers was directly at issue. Therefore, the trial court's task was especially demanding and its acceptance and rejection of the witnesses' answers on the basis of credibility should have been entitled to great weight on appellate review.

As the trier-of-fact, the trial judge was obliged to determine whether the motive of the prosecutor was unfairly to single out *Hustler* for a discriminatory purpose; and since there is ample evidence to support that conclusion, the judgment of the trial court should not have been reversed. In *Brescoll v. Nationwide Mutual Insurance Co.*, 116 Ohio App. 537, 189 N.E. 2d 73, 22 Ohio Op.2d 423 (1961), the court declared:

> "[U]pon an appeal taken from a judgment entered by the court upon the evidence. . . without the intervention of a jury, any fact necessary to sustain the judgment will be presumed to have been found by the trial court if the evidence can be found in support of such finding. *Crawford*

> *v. Bach*, 60 Ohio Law Abs. 179; *Gibsonburg Banking Co. v. Wakeman Banking Co.*, 20 C.C. 591, 10 C.D. 754. Or, in other words, where a trial court hears and determines a case without the intervention of a jury and does not make separate conclusions of fact and law, and any evidence is produced to support the conclusions reached under proper rules of law applicable thereto, a reviewing court will presume that the proper rules of law were applied. *Scovanner v. Toelke*, 114 Ohio St. 256" (22 Ohio Op.2d at 426, 427).

However, the court of appeals, solely upon the examination of the "frozen word" without the opportunity to observe the animated witness version firsthand, ignored the trial court's determination of credibility and, instead, chose to accept prosecutor Taylor's anemic explanation that the *Hustler* prosecution was a "test case" (A-13, A-14). The Ohio Supreme Court went even further and, in the critical words of dissenting Justice Brown, "selectively" adopted portions of the witnesses' testimony in an effort to support its own rather peculiar view of the facts.

During his testimony, Taylor had admitted that an immodest political cartoon ignited the *Hustler* prosecution (A-55, A-59, A-60), and that public reaction was an important factor in the prosecution of *Hustler* (A-102—A-104). Further, Officer Nemeckay conceded that not even *preliminary steps* had been taken in the prosecution of other men's magazines (A-137, A-138), and that he had been expressly instructed by Taylor to focus on *Hustler* (A-118). Despite these compelling statements in the record, the "test case" excuse was assigned preeminent importance by both the court of appeals and supreme court (A-13—A-15, A-21, A-22). The Ohio Supreme Court and court of appeals opinions relied upon the most ambiguous statements of Taylor and unreasonably rejected the trial court's well-supported findings that the tenuous "test case" claim was no more than a smoke screen. The trial court specifically wrote that "[t]he Court does not take into consideration that this is the first prose-

cution of this type of magazine or of this type of defendants" (A-6).

In a further effort to justify its finding that the prosecution of *Hustler* was a "test case", the court of appeals glossed over witness Taylor's admission that the prosecution was launched because of a political cartoon. Instead, both appellate courts emphasized that Taylor claimed *Hustler* was chosen because some portions were more "offensive" than those in similar magazines (A-13, A-22). However, the record shows that Taylor admitted that other magazines were "comparable to *Hustler*" and their pictures were "pretty much the same" (A-88, A-89), and in the case of some, the contents more explicit and thus clearly closer to the "guidelines" he had established but deviated from in this case (A-34—A-37, A-45, A-81, A-90). In assessing this testimony, the trial court's determination can be supported by this record upon a finding that what the witness Taylor found "offensive" about *Hustler* was the very political cartoon that he admitted had sparked its prosecution. The determination by the trial court would therefore, by necessity, be based upon a weighing of the witnesses' credibility. On the other hand, the appellate decisions below depend for their vitality, upon a rejection of the trial court's credibility determination, and a substitution of judgment of this score based solely upon the cold record of the testimony of the witness.

The words of Justice Stewart, albeit in a different context, epitomize the common sense of the well-established practice of deferring to the trial court in matters of judgment concerning the facts and credibility:

> "The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer. I doubt neither the diligence nor the perseverence of the judges of the Court of Appeals, or of my Brethren, but I suspect that it is impossible for a reviewing court factually to know a case from a . . .

> printed record as well as the trial judge knew it. In assessing the facts in lawsuits like these, therefore, I think appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance" (*Columbus Board of Education v. Penick*, 443 U.S. 449, 471 [1979] [Stewart, J. & Burger, CJ., concurring]).

In a case where discriminatory enforcement against controversial public figures has been alleged and found to exist, an appellate court's refusal to accept the trial court's well-supported determination of credibility of the testimony of witnesses violates the petitioners' rights to equal protection of the laws, especially where it is accomplished by selectively reading the record. In cases of less constitutional significance, appellate courts customarily defer to the findings of the court of the first instance. Thus, the Court should reverse the judgment of the Ohio Supreme Court and reinstate the holding of the trial court since, being entitled to "every reasonable presumption in favor of [its] findings" and "[a]ny fact necessary to sustain [its] judgment, including reasonable inferences drawn therefrom. . ." (A-23), the judgment is legally valid (*Beach v. Sweeney*, 167 Ohio St. 477, 150 N.E.2d 42 [1958]; *Brescoll v. Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 543, 189 N.E.2d 173 [1961]; *Thayer v. Shorey*, 287 Mass. 76, 191 N.E. 435 [1934]). Therefore, the Court should reverse the judgment below and reinstate the judgment of the trial court.

CONCLUSION

For all the foregoing reasons and authorities, petitioners respectfully urge this Court to reverse the judgment of the Ohio Supreme Court and affirm the judgment of the trial court below.

Respectfully submitted,

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APPENDIX A

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

OHIO REVISED CODE

§2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse, fellatio, and cunnilingus between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to

appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is

to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

CASE NO. 80-420

IN THE

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

Petitioners,

—vs—

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT, STATE OF OHIO

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CASE NO. 80-420

IN THE SUPREME COURT OF THE UNITED STATES

LARRY FLYNT, ET AL.

Petitioners

-vs-

STATE OF OHIO

Respondent

BRIEF OF RESPONDENT, STATE OF OHIO

QUESTION PRESENTED

Whether the Ohio Court of Appeals and Ohio Supreme Court properly held that Petitioners, Defendants in a criminal action for violation of Ohio Pandering Obscenity statute, were not entitled to dismissal of such action on grounds of alleged unconstitutional discriminatory enforcement and that case should be remanded for trial in Cleveland Municipal Court on such misdemeanor charges.

STATEMENT OF THE CASE

The Supreme Court of Ohio, in an opinion reported as State v. Flynt, 63 Ohio St.2d 132 (1980), affirmed the Cuyahoga County Court of Appeals decision to remand the misdemeanor pandering obscenity charges against the Petitioners for trial.

The case began in June of 1976, when an anonymous citizen sent a copy of the July 1976 issue of "Hustler" magazine to the Cleveland Police Special Investigation Unit and complained about the issue and specifically about a cartoon showing sexual activity between President Ford, Secretary Kissinger, and Vice-President Rockefeller and the Statute of Liberty. Shortly thereafter, the Special Investigation Unit and its Obscenity Investigation Detail received telephone calls from citizens complaining about this issue of "Hustler" and the

cartoon. (See Transcript at A-55-56, A-59-60, A-124-25.) These police then investigated whether the magazine was being sold in Cleveland and just what "Hustler" magazine was as far as content was concerned. The police requested a ruling from this attorney, then Assistant Law Director, as to whether the officers of Hustler's corporation could be charged in Cleveland for the crime of Pandering Obscenity in relation to the July 1976 issue. (Transcript at A-55-56 A-100.) "Hustler" magazine was the only material under investigation at that time, because it was the only one on which complaints were received, but other magazines were investigated after the decision to prosecute "Hustler" had been made. (Transcript at A-96-98, A-124.) The July issue of "Hustler" was reviewed by this writer and then the police secured a review of the magazine from several

municipal court judges (not including, at that time, Judge Calandra who later signed the arrest warrants and was subsequently assigned these cases through the court's lottery assignment method). (Transcript at A-127.)

Defendants were arrested in July of 1976, and the cases were assigned to Judge Salvatore Calandra. The hearing on the discriminatory prosecution issue was heard by the court on February 28, 1977, (See Transcript in Joint Appendix at A-29-144.) and the Memorandum to Attorneys and dismissal of charges was entered on May 17, 1977. (A-5-7).

The State received leave to appeal the dismissal, and the Cuyahoga County Court of Appeals reversed and remanded on February 8, 1979. (A-8-16.) The Ohio Supreme Court affirmed the Court of Appeals on July 16, 1980. (A-17-27). Both the Ohio Supreme Court and the Court

of Appeals held that Judge Calandra had not applied the correct legal principles to the facts established at the hearing, and that a case of unlawful discrimination had not been made. This Court granted Certiorari on December 8, 1980.

Testimony at Motion Hearing

On February 28, 1977, the Muncipal Court held a hearing on the Motion to Dismiss to take testimony concerning the allegations of unlawful discrimination. The defense called this attorney, then Assistant Law Director, to the stand first. Upon preliminary questioning, it was disclosed that the City had made over 500 arrests which led to prosecutions on films and magazines from Cleveland's "adult" bookstores and theatres. (Transcript at A-32.) Although most materials were explicit, some cases (perhaps 10%) involved child nudity, female masturbation, and newspapers such

as "Screw" and "Smut" which did not involve intercourse or penetration clearly shown. (Transcript at A-43-46.)

The prosecutor then summarized his views on "hard-core" from a street sense and a legal sense, distinguishing the "lewd exhibition of the genitals" option of the "Miller Test" from the street sense of hard-core penetration. (Transcript at A-48-53.)

"Hustler" was the first national magazine with a second class mailing privilege which was being prosecuted, but the police then became familiar with several other of these magazines. (Transcript at A-85-86, see also pages A-57 and A-114.) The Assistant Prosecutor's original intention to bring further prosecutions was conditional only, "because we're waiting for this case"; and whether those cases would definitely follow, "I don't know. That decision I

can't make alone either."; but, "It's being discussed". (Transcript at A-86.) The prosecutor admitted the likeness in "format" of several of these magazines (Transcript at A-87-89.), but explained the differences between "Hustler" and others. (Transcript at A-89-92.)

The defendants in this case were selected by their listing as officers of "Hustler" in the magazine (Transcript at A-98), and the charges followed the request by the police as to whether "Hustler" could be prosecuted in Cleveland. (Transcript at A-100.)

The role of this attorney in primarily deciding to prosecute "Hustler" after police request, as compared to the further role of superiors which may have been necessary against other magazines (because of the unusual publicity and complexity which arose in this case), was disclosed. (Transcript at A-102-103, See

also: A-86.) However the prosecutor summarized his intent (A-103) as to prosecuting others as follows:

> THE WITNESS: [Mr. Taylor] "My decision wouldn't be any different. I would be willing to prosecute anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case".

Among the legitimate considerations in an obscenity case, particularly, are public reaction (A-103), cost and time expended on certain classes of cases (A-103), publicity and jury verdict as measures of community standards (A-103-05).

The prosecution then made an independent statement as if he were asking himself questions, due to the fact no other prosecutor was present to object or cross-examine, and the prosecutor related the action of the City against several magazines being displayed at the municipal airport. (Transcript at A-109).

The prosecution then summarized his decision to first prosecute "Hustler" as opposed to any or several others. One reason was the considered judgment that the "Hustler" magazine which was the subject of the complaint was, in fact, probably obscene. Another reason was the ability to charge and serve arrest warrants on the officers of "Hustler" with the misdemeanor, a tactic not available as to officers of other magazines. See Transcript at A-109-10, as follows (See also A-111-12):

> THE WITNESS: [Mr. Taylor] . . . "Another question, if you were to ask me or if I were to ask me, what were some of the reasons for prosecuting Hustler.
>
> I would have to first say that after it was brought to our attention, maybe because of the cartoons and that's the only thing the people mentioned on the phone, it didn't matter. I had to review the magazine and the judge had to review the magazine as a whole. And another consideration has to be since we only have misdemeanor

> jurisdiction, we can only serve warrants from our Municipal Court in the State of Ohio. If we were going to prosecute Penthouse magazine, we wouldn't be able to prosecute the owners or the publishers of the magazine because we don't have any extradition power.
>
> Larry Flynt and his brother and now, his wife, reside and operate from Columbus, Ohio, which is in our jurisdiction. We can arrest them, and that was one of the major considerations to going against Hustler instead of something else.
>
> If we were going to enter into this field, we had to decide how we were going to do it. Certainly we can arrest Hustler magazine officers because the misdemeanor warrants issued from Cleveland can be served in Columbus. Misdemeanor warrants cannot be served in Chicago or London. That's another consideration for the reason we prosecuted Hustler magazine in the first place--"

The prosecutor continued with his statement of explanation that a test case on a "nationwide second class mailing privilege magazine" should not start with a local retailer, since this case was thought to be one of "first impression"

involving this genre of magazine. See Transcript at A-114, as follows (See also A-115):

> THE WITNESS: "I'd like to explain to the court that when we decided whether or not to prosecute Hustler magazine, and in deciding who to prosecute, since we felt that a nationwide second class mailing privilege magazine had heretofore had not been subject of day-to-day litigation, we felt it might be unfair to pick as our first target some man who has been selling, like everybody else, has been selling for years; and we felt the people who should be responsible were the people who make the magazine. That's why we did not arrest anyone in the Cleveland area, and arrested Larry Flynt and his officers."

Starting a test case against the owners and officers of one of the magazines seemed to be more fair and appropriate. Though it did attract more attention, the prosecutor was not then familiar with the reputation of the Defendants. In fact, the Cleveland case started before the prosecutor or police knew anything about Larry Flynt or his

recent indictment in Cincinnati. (Transcript at A-15.)

The trial judge found, in his Memorandum (A-6), that the City had only prosecuted "hard core pornography" from "adult" bookstores in the past; that other magazines were not prosecuted that contained "some hard core material"; that "Hustler" "did not contain hard core material" and that similar magazines were not prosecuted.

The trial court then discounted the fact this is the first case of its kind and concentrated on it's being the only case at the time. The court felt that the applicable law was to the effect that if other magazines are obscene then the City cannot prosecute only "Hustler". The court found that whether this was a test case was "legally insufficient" to sustain the prosecution.

Taking all the facts found by Judge

Calandra as true, the Court of Appeals (unanimously) and the Ohio Supreme Court (with one dissent) decided that the correct law of unconstitutional discrimination had not been applied. These Courts held that using a first case of this type as an intended "test case" was not a discriminatory purpose and that no evidence was given by the witness, nor found by the trial court, which showed any invidious motive to the selection of "Hustler". In the absence of such proof, the case was remanded for further proceedings.

SUMMARY OF ARGUMENT

It is admitted that the City's prosecution of "Hustler" magazine represents the first attempt to test the obscenity law against the standards of the Cleveland community toward a magazine which is sold nationwide and openly and has a federal second class mailing

privilege. This case was begun in 1976, before the conviction of the "Hustler" defendants in Cincinnati and in other states which brought them to nationwide attention. There is a simple reason for the selection of a single magazine to become a test of the law and the jury's judgment of standards. Obscenity cases are special in criminal law in that community standards can change, being "contemporary" for purposes of prosecution, and the class or type of materials subject to trial may change. Cleveland had a systematic history of vigorous obscenity law enforcement and wished to test Cleveland's standards of decency against the contemporary variety of "men's sophisticate" magazines to gauge the level of sexual explicitness or permissiveness the community feels should be tolerated as acceptable under the obscenity law.

As pointed out in the Transcript, at A-83-92, there are other so-called "adult" magazines on the market. Some others may be obscene as well, but "Hustler" was felt to be more so and a better title to begin with in order to increase the likelihood of success. Also, we could arrest these defendants by warrant, since "Hustler" was the only one of these published in Ohio. In order to charge others at the same time, we would have had to charge local merchants or distributors, since at that time it was believed, however mistakenly, that extradition could be sought only for a felony charge and not for an obscenity misdemeanor. These were the reasons for making this a "test" case. We were trying to determine if the genre of "men's" magazines had tread beyond the standards for obscenity. "Hustler" was picked for convenience of attaining process and

jurisdiction against persons responsible for the magazine, and to make a first case against a magazine we felt was more crass and had less saving features than other known "men's" magazines. (See Transcript at A-109-10, and 114 for prosecutor's explanation, also pages A-89-92 for comparison of "Hustler" with others).

Also to be considered, especially in obscenity litigation, is that each title of each magazine, and each monthly or periodical edition of each magazine, must be judged on its own, and any finding has no effect on other titles or editions, except as a deterrent. This Court in Hamling v. U.S., 418 U.S. 87, at 126 (1974), stated that whether a magazine has a second class mailing privilege has no bearing on its obscenity. The Court further noted distinctly that any magazine to be prosecuted must be judged independently and not on comparison to

others alleged to be similar. Id., at 125-26.

It was testified also (Transcript at A-40, 43-45, 48-50, 54, 57-58, 109) that the City has prosecuted other materials which did not show explicit penetration, such as "Screw" and "Smut" and some films, and took action against the magazines mentioned by the defense as other "men's" magazines at our Airport newsstands.

The Court of Appeals explained the major flaws in the defendants' proof, and held that their burden of proof had not been met (A-8-15). This decision was upheld on the same ground by the Ohio Supreme Court. See: State v. Flynt, 63 Ohio St.2d, at 134-36 (A-20-23).

It is the position of Respondent that there are several established principles which, when applied to the facts of this case, support the Ohio

Supreme Court's decision to remand this matter for trial:

1. The burden is on the defendant to show that he has been singled out for prosecution.

2. That the evidence must show the defendant is one of a class of substantially similar violators of the law.

3. That the exclusion of other guilty parties is affirmatively shown to be part of a conscious, intentional, and deliberate policy or practice on the part of a prosecutor who knowingly enforces such policy over a period of time.

4. That the prosecutor's invidious policy is clearly designed to harass the defendant in order to prevent the exercise of a fundamental right or to suppress a certain class of persons with no rational basis for distinction.

5. That the prosecution is not a bona fide test case but rather is shown to be in bad faith with no hope of obtaining a valid conviction.

LAW AND ARUGMENT

Proposition of Law No. 1

IN ORDER TO HAVE CRIMINAL CHARGES DISMISSED ON EQUAL PROTECTION GROUNDS, THE DEFENDANTS MUST MEET A HEAVY BURDEN OF PROVING CONSCIOUS AND INTENTIONAL DISCRIMINATION.

This case presents one issue, that of the legality of the City of Cleveland's effort to prosecute officers of "Hustler" magazine for Pandering Obscenity under R.C. 2907.32.

First to be considered is whether the Petitioners met their burden of proof upon their Motion to Dismiss in the trial court. It has been universally and historically followed in virtually every state and federal district that such is their burden. See: Annotation, "What

Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings", by John S. Herbrand, 95 A.L.R.3d 280 (1978), and Annotation, "Prosecution: What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in Federal Criminal Proceedings", by John S. Herbrand, 45 A.L.R. Fed. 732 (1979).

It must generally be shown that the prosecution engaged in invidious discrimination amounting to bad faith harassment based upon arbitrary classification. Snowden v. Hughes, 321 U.S. 1, 7-8, 88 L.Ed.2d 497, 502-03 (1944); Oyler v. Boles, 368 U.S. 448, 454-56, 7 L.Ed.2d 446, 452-53 (1962); State v. Streurer, 37 Ohio App.2d 51, 58-59, 306 N.E.2d 425, 429-30 (Summit County, 1973), cert. den. 416 U.S. 940 (1974).

A. Supreme Court Decisions On Discriminatory Prosecution

The general principles of law applicable to unconstitutional discrimination in the application of valid criminal statutes began in this Court with the cornerstone case of Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220 (1886). The Court considered an ordinance which left the enforcement solely to the discretion of the sheriff, and held that enforcement offended the Fourteenth Amendment because the law was enforced "with a mind so unequal and oppressive as to amount to a practical denial" of equal protection of the laws. The Court then stated a general rule which is so often quoted, 118 U.S., at 374, 30 L.Ed., at 227:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The Court found sanction for this ruling in its previous cases dealing with immigrant tax and levy laws, which created numerous standards among state ports harmful to the uniform interests of international commerce and were enforceable at the whim and fancy of a single officer, Henderson v. Mayor, 92 U.S. 259, 274-75, 23 L.Ed. 543, 550 (1876); Chy Lung v. Freeman, 92 U.S. 275, 278-81, 23 L.Ed. 550, 551-52 (1876), and also in cases mandating the inclusion of blacks on jury venire rolls, Ex parte Virginia, 100 U.S. 339, 345-47, 25 L.Ed. 676, 679-80 (1880); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881).

This Court denied any basis for discriminatory prosecution, upon stipulated facts that a law prohibiting

the unlawful visiting of a gambling house had been enforced only against Chinese persons, in Ah Sin v. Whittman, 198 U.S. 500, 507-08, 49 L.Ed. 1142, 1145-46 (1905). The Court found that an admission that so far only Chinese had been charged was not an admission of discrimination, but a submission of the facts for a determination of law. (As in the case sub judice.) In order to strike the law, valid on its face, because of "the manner of its administration" required evidence of intent to discriminate. As stated at 198 U.S., 508:

> No latitude of intention should be indulged in a case like this. There should be certainly to every intent. . . . This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state.

In Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 62 L.Ed. 1154 (1918), one mining company, whose assessment was still

active after a new appraisal, was evaluated at its full value while others had not yet been brought up to such value. The Court noted that "intentional systematic" within "the same class" may violate the right of the one who suffers the separate treatment. However, recognizing that the distinction in that case was "not incompatible with an honest effort in new and difficult circumstances" the Court, at 247 U.S., 353, held that no abridgment of the Constitution had occurred:

> There must be something more [than "mere errors of judgment"],--something which in effect amounts to an an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. [Emphasis added.]

In Mackay Tel. & Cable Co. v. Little Rock, 250 U.S. 94, 63 L.Ed. 863 (1919), a

pole tax law was held not to have been unconstitutionally enforced merely because it was not enforced against other companies in the same manner, and recognized prosecution test cases as valid justification for selection. It was noted at 250 U.S., 100, 63 L.Ed., 869, that one company was taxed on all its poles and others were not, and the Court held (appropriate to this "Hustler" case):

> There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance, as in Yick Wo. . . . Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense.

Next in succession was the pre-eminent opinion of Chief Justice Harlan Stone in Snowden v. Hughes, 321 U.S. 1, 8, 88 L.Ed. 497, 503 (1944), where

the court stated:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person [such as a statute which clearly restricts a particular company . . ., or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself [such as a city denying laundry licenses to all Chinese applicants and issuing licenses to non-Chinese: Yick Wo v. Hopkins, supra. . . . But a discriminatory purpose is not presumed . . ., there must be a showing of "clear and intentional discrimination". . . .

The Snowden decision held that no federal cause of action was stated, and no denial of equal protection was involved, where a statute discriminated against successful and unsuccessful candidates

"since the distinction . . . is based on a permissible classification" (Id., 321 U.S., 8, 88 L.Ed., 502), and there was a "lack of any allegations in the complaint here, tending to show a purposeful discrimination" merely by characterizing such distinction with the epithets "willful" "malicious", "unequal, unjust, and oppressive" (Id., 321 U.S., 10, 88 L.Ed., 503-04).

This Court later clarified that mere selective enforcement was not unconstitutional enforcement. In Oyler v. Boles, 368 U.S. 448, 454-56, 7 L.Ed.2d 446, 452-53 (1962), the Defendant showed that he was one of six men qualifying for prosecution under a habitual offender law, but was the only one singled out for further action. The Court found that this selection was not an unconstitutional infringement on his rights, in the absence of evidence that the failure to proceed

against others was not due to lack of knowledge but was "the result of a deliberate policy" of discrimination:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standards such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged. (Id., at 368 U.S., 456, 7 L.Ed.2d, 453.)

The necessity for looking closely at the facts and the prosecutor's intent is shown by the affirmance of a black's conviction in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759 (1965), where it was not proven by the defense that all of the exclusions of blacks from jury panels was due to the prosecutor's peremptory policies, since great latitude was allowed in peremptory exercises and no right of

proportionate equality of race was constitutionally mandated. Justice White, speaking for five members of the Court, with Justice Black concurring in the result, concluded that where the exclusion of blacks was not shown beyond question to be the state's sinister responsibility, then the defendant who wishes to attack the prosecutor's motive and actions must "be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter". Id., 380 U.S., 277-28, 13 L.Ed.2d, 777.

This statement is particularly relevant to this case because this attorney was assigned to enforce the obscenity statute in Cleveland and was made available for questioning. The defendants should have at least attempted

to prove more than that "Hustler" was the first "men's sophisticate" magazine to be tested for obscenity in Cleveland. No inquiry showed any personal malice against any defendant or against the magazine particularly. In fact, the police and prosecutor did not know anything more of the defendants except that they were the only such magazine owners who lived in the effective warrant jurisdiction of the Municipal Court.

Justice Goldberg, joined in dissent by Chief Justice Warren and Justice Douglas, felt that blacks should not be systematically prevented from jury seating, even by peremptory challenge. The dissent argued that a prima facie case of unlawful jury exclusion was made out by showing that no black had ever served in that county, and that the burden should be on the State to disprove discriminatory jury selection. Id., at

380 U.S., 239-42, 13 L.Ed.2d, 783-85. The dissent felt the greater duty on the defendant in that case was a rejection of prior cases such as Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074 (1935); Patton v. Mississippi, 332 U.S. 463, 92 L.Ed. 76 (1945); and Henandez v. Texas, 347 U.S. 475, 98 L.Ed. 866 (1954), because no difference should be drawn between chosing blacks for a jury itself as opposed to calling blacks to a venire panel.

Such emotional issues as racial discrimination have quite properly charged the atmosphere of state-federal adjudications at the time. However, whether the owners of one allegedly obscene magazine should be the first defendants of their tax subsidized mailing privilege class to test the obscenity law under the Miller criteria should not elicit the same frustrations. Would it truly matter to the First Amendment

freedoms of speaking one's mind whether "Hustler" goes first, or whether "Hustler" and "Penthouse", "Swank", or another go first together? Must a city prosecutor in Cleveland charge one local defendant who lived 130 miles from the Municipal Court and also attempt to extradite for a misdemeanor another one or two or three publishers from Chicago, New York, or London, England? The defense complains that we deviated from our practice of charging the Cleveland residents who actually worked as clerks in local retail stores and theatres. It seems more rational and fair to make a test case with the persons responsible for one of the magazines, and who reap the greatest financial reward from the sexual appeal of these magazines, than to charge only local retailers. The potential for discrimination would have been far greater had the Cleveland prosecutor and police

arbitrarily picked one retailer to buy two or three magazines from for evidence. Wouldn't we have been criticized for picking one store over another, and on what basis? Would it have been more "fair" to arrest every one of the hundreds of local merchants and purchase several hundred magazines to do so? Such an alternative places a "heavy burden" on the budget of the Prosecutor's Office as well as the Police Department and the Municipal Court, not to mention the mammoth complexity created for a jury and the appellate courts. The defense costs would also have been astronomical and the owners of the magazines would either escape the melee or be forced to underwrite the cost in any event.

The Court's majority decision in Swain, supra at 380 U.S., 226-27, 13 L.Ed.2d, 776, still maintained the established rule that:

> Petitioner has the burden of proof and he has failed to carry it. . . . This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners. But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. [Emphasis added.]

The difference of opinion between the majority and dissent in Swain is not a difference of philosophy regarding civil rights for blacks as a difference between judicial philosophies which we feel the Court should reach beyond the record before it and deal with the "real" problem or rule on the actual evidence by application of rules of law, with deference given to the "presumption" of prosecutorial regularity. This choice is not necessary in this case.

The next case in this Court's established line of discriminatory prosecution rulings is Cameron v. Johnson, 390 U.S. 611, 20 L.Ed.2d 182 (1968). In this case, involving civil rights issues in relation to an anti-picketing statute enacted during the course of an ongoing voter registration demonstration, Justice Brennan, for a seven vote majority, held that the statute was constitutional on its face and that the record did not establish bad faith or selective enforcement designed to harass them with no expectation of obtaining convictions. Dissenting Justices Fortas and Douglas felt, on the contrary, that the proseuctors did seek to harass and were not honestly hoping for a valid conviction. This Court had once remanded this controversy to the federal court for consideration of the standards of Dombrowski v. Pfister, 380 U.S. 479, 14

L.Ed.2d 22 (1965), and upon a second dismissal, this Court affirmed on the merits. (See: 390 U.S., 613-14.) This Court noted the duty of the authorities to attempt enforcement of the new law, even though no arrests were made prior to the change in the law. Cameron, supra at 390 U.S., 620-21, 20 L.Ed.2d, 190.

This is not materially different from the Cleveland authorities continually proving that obscenity consisted of the books and films from so-called "adult" bookstores and theatres and then trying to prove that certain other magazines were also now obscene because the level of explicitness in showing lewd exhibition of the genitals rather than "mere nudity" and providing some "hard core" selections have pushed them, such as "Hustler", over the brink of the law as announced in Miller v. California, 413 U.S. 15, at 24-25 (1973). The Ohio courts have clearly mandated that

the "Miller Test" was a necessary part of Ohio jury instructions. State of Ohio v. Ronald Burgun, 56 Ohio St.2d 354, 356-61, 384 N.E.2d 255, 258-61, 10 Ohio Ops.3d 485 (Sup. Ct. Ohio 1978); State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, 123-24, 127, 359 N.E.2d 1018, 1025-26, 3 Ohio Ops.3d 177 (Ct. App. Cuyahoga County, 1976). This adoption of the Miller standards by authoritative construction would be applied to "Hustler" at trial and was the basis for the trial court finding that the Ohio statute is constitutional and that the two issues of "Hustler" which are involved in this case "are obscene as a matter of law and not entitled to protection under the First Amendment". Memorandum To Attorneys, see Joint Appendix at A-5.

The Court in Cameron v. Johnson, supra at 390 U.S., 620-21, 20 L.Ed.2d, 190-91, recognized that it would "strike

down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See: Cox v. Louisiana, supra [379 U.S. 559, 13 L.Ed.2d 487 (1965)]; Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240 [1963]; [1963]; Edwards v. South Carolina, supra [372 U.S. 229, 9 L.Ed.2d 697 (1963)]."

The Court also noted that "the record is not totally devoid of support for the State's claim "that the picketers were or may have been violating the statute and disposed of the case upon the established selective enforcement principles:

> But the question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possiblity of erroneous application of the statute does not amount "to the irreparable injury necessary to justify a disruption of orderly

> state proceedings." Dombrowski v. Pfister, supra, at 485, 14 L.Ed.2d at 27. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions.

In light of the facts freely established at the hearing in Cleveland Municipal Court, it would be an insult to the principles sought to be protected in Dombrowski to treat the "right" to publish pornography as a suspect classification or a specially protected exercise in a fundamental freedom. See: Paris Adult Theatre v. Slaton, 413 U.S. 49, at 66, 37 L.Ed.2d 446, 462 (1973). "Hustler" is certainly "pornographic" but whether it is "obscene" awaits trial. This Court in Miller, supra at 413 U.S., 18, footnote 2, recognized that "Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole,

at least as the word 'obscene' is used in our language." When the City of Cleveland was brought complaints from the "community" that "Hustler" was possibly offensive, that was a reasonable basis upon which to begin action to judicially determine whether "Hustler" was also legally obscene.

In fact, certain of the "men's sophisticates" (as the magazine industry classifies these titles) have been tested for their obscenity. In Penthouse International, Ltd., v. McAuliffe, 610 F.2d 1353, 1362-73 (5th Cir. 1980), the January 1978, issues of "Penthouse" and "Oui" were found obscene but the same month of "Playboy" was found not obscene. In another case, cited with approval in footnote 4 of the Penthouse case, supra at 1368, the Court of Appeals of Illinois, per Justice Charles E. Jones, found the February 1976 "Playboy" not obscene but

found the February 1976 "Viva", the February and March 1976 "Playgirl", the December 1974 "Genesis", the April 1976 "Dapper", the March 1975 "Gallery", and two magazines entitled "Love Games" and "Loving Couples" were, in fact and law, obscene. City of Belleville v. Morgan, 60 Ill. App.3d 434, 17 Ill. Dec. 558, 376 N.E.2d 704 (Ct. App. Ill. 1978). "Hustler" has also been found obscene, in a case involving eight monthly issues of "Hustler" and three issues of "Chic" (another "Larry Flynt Publication") which were all found obscene by the jury and appeals court. Flynt v. State of Georgia, 153 Ga. App. 232, 264 S.E.2d 669, at 679 (Ct. App. Ga. 1980), cert. den. by Sup. Ct. Ga. 1980, cert. den. 64 L.Ed.2d 837 (Oct. 6, 1980).

In the area of racial discrimination, in Washington v. Davis, 426 U.S. 229, 239-48, 48 L.Ed.2d 597, 507-12 (1976), and

Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 264-68, 50 L.Ed.2d 450, 464-66 (1977), it was repeated that: "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." The analogy to established criminal law enforcement is strong that mere selectivity is not unlawful but that an intent to systematically harass or injure the selected defendant is dependent on "whether invidious discriminatory purpose was a motivating factor". As summarized in Arlington Heights, supra at 429 U.S., 265: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." This Court in Washington, supra at 426 U.S., 238-39, made clear that the lower court erred in focusing "solely on the racially differential impact" of the

practice rather than on the "possibly discriminatory purpose". This is the same error committed by the Cleveland Municipal Court in dismissing these obscenity charges solely because "Hustler" was the first and only such magazine then on the Court's docket, without giving any consideration to the prosecutor's reasons for selection or the rational basis for choosing "Hustler" as a test case.

Finally, this Court unanimously held that a prosecutor may choose which of two unequal penalty statutes under which an offender is to be sentenced. United States v. Batchelder, 442 U.S. 114, 60 L.Ed.2d 755 (1979). The traditional rule of Oyler v. Boles, supra, was applied with due consideration for the flexibility of prosecutorial discretion, and as long as the government does not discriminate "against any class of defendants" "based upon an unjustifiable standard such as

race, religion, or other arbitrary classification", there is no violation of Equal Protection or Due Process. The Court characterized the necessary form of discriminatory standard as a prosecution which is "motivated by improper considerations". Batchelder, supra, at 442 U.S., 124-25, 60 L.Ed.2d, 764-65, and footnote 9.

The end result of this Court's decisions, from Yick Wo to Batchelder, are general guidelines for determining whether selection of a defendant is unconstitutionally discrimantory (See also: 16 Am. Jur.2d, Constitutional Law, Section 541, p. 930):

1. The burden is on the defendant to show that he has been singled out for prosecution. Snowden v. Hughes, supra; Oyler v. Boles, supra; Swain v. Alabama, supra.

2. That the evidence must show the

defendant is one of a class of substantially similar violators of the law. Yick Wo v. Hopkins, supra; Ah Sin v. Whittman, supra; Snowden v. Hughes, supra.

3. That the exclusion of other guilty parties is affirmatively shown to be part of a conscious, intentional, and deliberate policy or practice on the part of a prosecutor who knowingly enforces such policy over a period of time. Yick Wo v. Hopkins, supra; Ah Sin v. Whittman, supra; Swain v. Alabama, supra; Washington v. Davis, supra; Arlington Heights v. Metro. Housing Corp., supra; Sunday Lake Iron Co. v. Wakefield, supra.

4. That the prosecutor's invidious policy is clearly designed to harass the defendant in order to prevent the exercise of a fundamental right or to suppress a certain class of persons with no rational basis for distinction. Yick Wo v. Hopkins, supra; Mackay Tel. & Cable Co. v.

Little Rock, supra; Snowden v. Hughes, supra; Oyler v. Boles, supra; Cameron v. Johnson, supra; United States v. Batchelder, supra.

5. That the prosecution is not a bona fide test case but rather is shown to be in bad faith with no hope of obtaining a valid conviction. Mackay Tel. & Cable Co. & Little Rock, supra; Cameron v. Johnson, supra.

B. Federal Court Cases On Discriminatory Prosecution

Numerous federal appeals and district courts have recited the general rules discussed above, especially referring to Yick Wo and Snowden, supra, and proceeded to decide whether the defendants' proof has satisfied the elements of unlawful discrimination. See: Adam Clayton Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970) (election errors do not amount to racial discrimination); Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963)

(being one three violators of Sunday law charged where others not charged is not sufficient to prove purposeful discrimination); United States v. Crowthers, 456 F.2d 1074, 1078-80 (4th Cir. 1972) (Pentagon could not allow favorable demonstrations and prevent unfavorable groups); United States v. Raven, 500 F.2d 728, 733 (5th Cir. 1974) (unfair selection not proved by being first defendant charged under statute); United States v. Ream, 491 F.2d 1243, 1246 (5th Cir. 1974) (defendant not entitled to challenge selection unless proof offered to doubt prosecutor's motive); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), cert. den. 381 U.S. 935 (1965) (prosecutor's choice to indict defendant was matter of proper discretion); Delia v. Court of Common Pleas of Cuyahoga County, Ohio, 418 F.2d 205, 206 (6th Cir. 1969) (state court action in incorrectly

applying state law is not purposeful discrimination); United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973) (En Banc) (vocal and successful draft counsellor only person charged with failing to carry draft card); United States v. Catlett, 584 F.2d 864, 866-67 (8th Cir. 1978) (no denial to bragging tax evader); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) ("colorable basis for selective prosecution claim" must be shown to require discovery); United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974) (defendant must be allowed to present defense to tax prosecution of intentional discrimination); United States v. Steele, 461 F.2d 1148, 1151-52 (9th Cir. 1972) (unlawful to charge leaders of census resistance movement and not others without explanation or justification for selection); United States v. Sacco, 428 F.2d 264, 271 (9th

Cir. 1970) (suspected criminal activities was sufficient basis to select defendant for alien registration violations); Spillman v. United States, 413 F.2d 527, 530 (9th Cir. 1969), cert. den. 396 U.S. 930 (1969) (mere deviation from prosecutorial "policy" could not justify acquital); Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1963) (no frivolous discovery permitted where bare epithets were unsupported by proffer); and Boynton v. Fox West Coast Theaters Corp., 60 F.2d 851 (10th Cir. 1932) (that other prosecutors do not prosecute does not prevent fair enforcement by one prosecutor against theater for Sunday law). See also: Morgan v. Detroit, 389 F.Supp. 922 (E.D. Mich. 1975) (no denial to prosecute prostitutes and not customers where it was arguable whether customers came within statute used); 227 Book Center, Inc. v.

Codd, 381 F.Supp. 1111 (S.D.N.Y. 1974) (both stores and theatres who violate obscenity law must be charged); United States v. Robinson, 311 F.Supp. 1063, 1064-65 (W.D. Mo. W.D. 1969) (defendant cannot be singled out for prosecution without justification); and Epstein v. Maddox, 277 F.Supp. 613 (D. Ga. 1967), aff'd. 401 F.2d 777 (5th Cir. 1968) (consistent or protracted or collusive discrimination is unlawful, but test case is permissible to enforce against all offenders since government must start with someone).

Although some cases, such as U.S. v. Cox, supra at 171, U.S. v. Raven, supra at 733, and U.S. v. Ream, supra at 1246, place great weight on the discretion of prosecutors, it has also been said that a hearing need be held only if the defendant makes a preliminary showing sufficient to "raise a reasonable doubt about the

prosecutor's motive". U.S. v. Falk, supra at 620-21. The Petitioners' Brief, at 18, recognizes the ultimate burden of "the defendant to prove discriminatory enforcement, when purposeful discrimination is shown", but adds that the case law also requires a shifting of the burden to the prosecutors to "demonstrate a compelling interest that necessitates the discrimantory enforcement of serious criminal statues", and that such shift should occur after only "a mere threshold showing of discrimination". The cases cited and all the cases reported, however, do not support such a broad departure from the established rules. In U.S. v. Falk, supra at 624, U.S. v. Crowthers, supra at 1078-79, U.S. v. Steele, supra at 1151, and Murguia v. Municipal Court, 124 Cal. Rptr. 204, at 216 (Sup. Ct. Cal. 1975), none of the courts relied on a "mere threshold

showing" but all involved a record which clearly convinced the courts that an evil motive underlie each selection of defendants. In Falk, supra at 621, the court noted the prosecutor's admission that he charged Falk for not carrying his draft card because he was a draft counsellor and because "a good deal of their trouble in enforcing the draft laws came from people such as Falk". In Crowthers, supra at 1078, that court noted that there was "not one scintilla of evidence in the record" that the government offices were actually impeded or disturbed by the arrested demonstrators but that "the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint". The Crowthers court recognized that it was basing its decision in part "upon reversal of the ordinary burden of proof"

and did so because "there is enough in the record to show unequal and oppressive application", such as "approved" rallies of twice the size of the defendants'. The motive of the Pentagon was not to select the defendants on the basis of noise or disturbance but to stifle voices they disliked. Id., at 1079. In Steele, supra at 1151-52, the court applied the general burden rules but found support in the record for a plan by the government to purposely hamper Steele's anti-census campaign while leaving others alone, especially since the "government offered no explanation for its selection of defendants, other than prosecutorial discretion". In Murguia, supra, the evidence clearly showed, and the prosecutor impliedly admitted, that these defendants were charged with traffic and criminal code violations because they belonged to a particularly active Union.

The court held on this showing, not that dismissal was warranted, but that further discovery must be allowed.

The Petitioners' Brief, at 15, 17, also admits that both selection and discrimination must be proved, even when the First Amendment is alleged to be the defendant's shield. These two-parts of the test for selective discrimination are particularly well stated and supported by the recent decision of U.S. v. Catlett, supra at 866. The late Senior Circuit Judge of the Eighth Circuit, Judge Van Oosterhout, stated the following standard in a case alleging a selection of the defendant "which penalizes him for exercise of his first amendment rights" because the defedant had "received widespread publicity and notoriety":

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for

> prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975). See also United States v. Ojala., supra, 544 F.2d at 943.

Another relevant case is 227 Book Center, Inc. v. Codd, 381 F.Supp. 1111 (S.D. N.Y. 1974), which involved a Section 1983 action by "adult" bookstore companies seeking to prevent prosecution of porn stores because no action had been taken against porn theatres. The court repeated that intentional and purposeful discrimination was required and allowed the cause of action to proceed in order to allow plaintiffs to attempt to prove that

the purpose of the discrimination was to drive all the stores out of business but leave the theatres alone to violate the obscenity laws. In Cleveland, all of the "adult" theatres and bookstores were continually charged and the effort to broaden the scope of enforcement into the "drugstore porn" industry is more in keeping with equal enforcement than a violation of equal protection.

C. State Court Cases On Discriminatory Prosecution

Unlike the majority of federal cases on this issue, which deal most often with political speech and tax evasion matters, the state court cases on selective enforcement have generally been involved with Sunday closing laws, habitual offender statutes, and prosecutions of certain public officials.

A general statement of the rule as to unconstitutional enforcement of otherwise valid laws is set out in 16 Am.

Jur.2d, Constitutional Law, Section 541, p. 930:

> Mere errors of judgement by officials will not support a claim of discrimination violative of constitutional guaranties of equality. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination. Mere laxity on the administration of the law, no matter how long continued, is not and cannot be held to be a denial of the equal protection of the law. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Some courts have taken the position that in the absence of facts properly pleaded, showing a fixed continuous policy of unjust discrimination on the part of a municipality, they will not enter on a consideration of the question whether its administration is in violation of the guaranties as to the equal protection of the laws.

In a case often cited by other courts, and relied upon specifically by

both the Ohio Court of Appeals (A-12) and the Ohio Supreme Court (A-22) in this case below, People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962), the Appellate Division of the Supreme Court of New York clarified the law as to burden of proof, matters of evidence, and requirements of the law. While remanding for a new trial, the court gave guidance on issues which are most applicable to this "Hustler" magazine case:

> [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be

> unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that constitutional violation may be found. (Id., 225 N.Y.S.2d, 136.)

The highest court of New York also gave its approval and support for these established principles in People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, at 143 (Ct. App. N.Y. 1972).

Another pertinent New York case involved the use of health and building codes by the Midtown Task Force to attempt to put a dent in the blight and crime of downtown Manhattan caused in no small measure by the proliferation of flagrant obscenity law violators in the numerous sex-related establishments, adult bookstores, peep shows, etc. People v. Mantel, 88 Misc.2d 439, 388 N.Y.S.2d 565 (Crim. Ct. City of N.Y., 1976). The court found "no real dispute as to the

activities themselves", despite "press release or political bombast" statements that the City would "stop at nothing when we try to put these people out of business". Id., at 388 N.Y.S.2d, 567. The court concentrated on "the strictly legal question whether, given the City's limited resources and inability to prosecute all Administrative Code violations, the decision to deploy the resources of the Midtown Enforcement Project against sex-related establishments was a legitimate exercise of prosecutioral power or a violation of defendants' right to nondiscriminatory prosecution under the Fourteenth Amendment". Id. The Court found ultimately that no further hearing was called for and that the allocation of resources was "both rational and permissible". Id., at 569. The court also stated the reasonable standards for making such review. Id., at 568:

> The test of whether a prosecutor has made a reasonable classification would better be judged along more traditional lines of permissible prosecutorial discretion, i.e. police resources, the social value of a particular conviction as against the time and expense to the state, the value of a "striking" example, etc.

Another obscenity case in this area has recently upheld the established rules and found no constitutional excuse for law violations. Starley v. City of Birmingham, 377 So.2d 1131 (Ct. Cr. App. Ala. 1979), cert. den. No. 79-1476, 64 L.Ed.2d 815 (May 19, 1980). The court cited three general elements which must be proved (Id., at 1132-33): "(1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification." The contention of those defendants was that they operated "adult book stores and theaters" and that

"numerous drug and convenience stores sold magazines (Playboy, Oui, etc.) containing sexually related matter similar to that portrayed in magazines sold at the adult book stores" (Id., at 1132).

The court concluded, Id., at 1133:

> A review of the evidence reveals that although enforcement of the Birmingham ordinance may not have been universal there is no evidence to indicate an intentional selectivity based upon an unjustifiable standard. The evidence does not indicate that the City focused its prosecutorial sights exclusively upon the appellant. It is apparent that appellant has not met his burden of proof in this regard.

The Supreme Court of Alabama denied certiorari, 377 So.2d 1135-36 (Dec. 21, 1979), and this Court also denied certiorari, 64 L.Ed.2d 815 (May 19, 1980).

Many other state courts have also applied the general rules established by this Court. See: State v. Nixon, 10 Wash. App. 355, 517 P.2d 212, 214 (Ct.

App. Wash. 1973) (no denial to habitual criminal absent proof of deliberate selection on unjustifiable standard); State v. Coutcher, 198 Kan. 282, 424 P.2d 865, 869 (Sup. Ct. Kan. 1967) (no denial to habitual criminal because codefendant not so charged); Bell v. State, 369 So.2d 932 (Sup. Ct. Fla. 1979) (prostitutes not denied protection because police not prosecuted for conduct involved in gathering evidence); People v. Battin, 77 Cal. App.3d 635, 143 Cal. Rptr. 731, 95 A.L.R.3d 248, 274-75 (Ct. App. Cal. 1978), cert. den. 439 U.S. 862 (1978) (case against political candidate not illegal when started by complaint from citizen-staff member of candidate to prosecutor who belonged to opposite party); People v. Edmonds, 578 P.2d 655 (Sup. Ct. Colo. 1978) (telephone company's non-subscriber not denied equal protection though subscribers not prosecuted for

extra phone since such is "rational basis" to select); State v. Hodgdon, 31 Or. App. 791, 571 P.2d 557 (Ct. App. Or. 1977) (convenience and better facilities for women prisioners at county jail justified charges under statute rather than ordinance, defendant must show purpose, not result, was discriminatory); Pier I Imports, Inc. v. Pitcher, 270 So.2d 228 (Ct. App. La. 1972), cert. den. 272 So.2d 696 (Sup. Ct. La. 1972) (no denial of equal protection when Sunday law violator was first and only store complained of by citizens); State v. Solomon, 245 S.C. 550, 141 S.E.2d 818, 14 A.L.R.3d 1277 (Sup. Ct. U.S.C. 1965), appeal dismissed for want of substantial federal question 382 U.S. 204 (1965) (mere non-action against other Sunday law offenders not enough in light of total absence of testimony to show purposeful discrimination); In re Hawaiian Land Co.,

487 P.2d 1070, 1075 (Sup. Ct. Hawaii, 1971) (mistakes of judgment not enough to prove defense, need "intentional violation of essential principle of practical uniformity", defense not proven on record before court, especially in light of limited resources of government officer); People v. Pearce, 8 Cal. App.3d 984, 87 Cal. Rptr. 814, 817 (Ct. App. Cal. 1970) (no proof of "malicious intent", selection justified by enforcement against greater threat to state or most efficient enforcement given limited resources).

The development and application of this Court's principles is no better illustrated then by the Ohio cases on this subject.

In State v. Flynt, 63 Ohio St.2d 132 (1980), the case now before this Court, the Ohio Supreme Court looked objectively at the record and found a failure of proof on the standard burden to show purposeful

discrimination. The recognized justification for testing the application of a statute was relied on absent proof that generalized enforcement was not likely to follow a successful result. Id., at 135 (Joint Appendix, at A-21-22).

In State v. Steurer, 37 Ohio App.2d 51, 58-60, 306 N.E.2d 425, 429-31, 66 Ohio Ops.2d 89 (Summit County, 1973), cert. den. 416 U.S. 940 (1974), the court repeated that more is needed than merely showing non-action against others. The court noted that prosecutorial discretion alone could not justify purposeful discrimination unless there was a "rational basis for the selection".

In an interesting application of common sense to this issue the Municipal Court of South Euclid, Ohio, held in the first case against a Sunday law defendant that other violators could not be ruled out from future actions. As stated in

City of South Euclid v. Bondy, 92 Ohio Law Abs. 108, 26 Ohio Ops.2d 69, 192 N.E.2d 139, at 142, (Muni. Ct. So. Euclid, 1963):

> True enough, the defendant Bondy is the first to be prosecuted for a violation of this law. But, as with violators of every law, someone has to be first.

Through the continued efforts to exact compliance by this defendant after his first conviction, the same court, on the third case against this defendant, stated in City of South Euclid v. Bondy, 95 Ohio Law Abs. 297, 28 Ohio Ops.2d 316, 200 N.E.2d 508, at 512 (Muni. Ct. So. Euclid, 1964):

> At some point of time, such conduct by a City must inevitably become tantamount to an intentional and purposeful discrimination. . . . However, in the opinion of this Court, the City's conduct has not quite reached that point. . . .

Absent a clear intent to persecute, rather than a reasonable policy of prosecution, the Ohio courts have consistently upheld these principles. See

also: State v. Wolery, 46 Ohio St.2d 316, 325-26, 75 Ohio Ops.2d 366, 348 N.E.2d 351, 358 (1976), cert. den. 429 U.S. 932 1976); Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728, 730 (1962); State v. Keich, 145 N.E.2d 352, 535 (Ct. App. Mahoning County, 1956).

Proposition of Law No. 2

THE COURT OF APPEALS, IN REVIEWING A MUNICIPAL COURT DISMISSAL OF CRIMINAL CHARGES ON DISCRIMINATORY ENFORCEMENT GROUNDS, MUST RULE ON THE SUFFICIENCY OF THE DEFENDANT'S EVIDENCE IN ESTABLISHING UNCONSTITUTIONAL ENFORCEMENT AMOUNTING TO CONSCIOUS, DELIBERATE, AND ARBITRARY DISCRIMINATION, AND IF THE DEFENDANT HAS NOT MET SUCH HEAVY BURDEN TO REMAND FOR TRIAL.

The Petitioner's Brief, at 25-28, makes a great controversy out of the allegation that the Ohio Court of Appeals and the Ohio Supreme Court substituted their own distorted version of the facts for that of the trial court. They rely for the most part on the dissent of Justice Paul Brown of the Ohio Supreme

Court in the case below, 63 Ohio St.2d, at 136-39 (Joint Appendix, at A-23-27), as they should. However, there really is no conflict in the "credibility of witnesses" nor in the facts established. They only difference of opinion between the trial and appellate courts is in the application of the plain facts to established principles of law. In fact, the majority of the Ohio Supreme Court went out of their way to make this clear in footnote 2 of their opinion (A-23) where it is stated:

> Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper deterimination of the credibility of the witnesses at trial.

In the Ohio courts, below, in reviewing the testimony of the prosecutor and police officer, and the claims of "Hustler", it was held that the burden of

proof must be on the defendants and that purposeful discrimination was not shown. In the trial court's Memorandum (A-5-7), Judge Calandra took the position that whatever available material is obscene should all be prosecuted and that one magazine, whether "Hustler" or whatever, cannot be singled out for a test case (A-6). The Court of Appeals unanimous decision (A-8-15) did not disagree with the trial court's findings that this was the first and only "men's magazine" to face such prosecution in Cleveland but did find that a test case is a proper rationale for beginning with "Hustler" because of the more offensive nature of these issues and the "greater difficulties of service" upon officers of other out-of-state magazines (A-13). The Court of Appeals also ruled that on the facts adduced, the defendants failed their heavy burden of proving that a "discriminatory

intent is present" (A-13), especially in light of the failure of defendants to question the assistant prosecutor's superiors as to whether they would prevent further generalized enforcement after the "Hustler" case was concluded (A-14-15). The Court of Appeals also took a more in-depth examination of the transcript of testimony and concluded that no "deliberate discrimination involving an arbitrary classification" was present and, to the contrary, "The selection of Hustler for a test case, in fact, was based on several rational factors differentiating it from magazines of th same format." (A-15)

The Supreme Court of Ohio agreed with the Court of Appeals in a six to one vote Per Curiam decision in State of Ohio v. Flynt, 63 Ohio St.2d 132, 407 N.E.2d 15 (July 16, 1980) (Copy in Joint Appendix at A-17-23). The Court applied the

established rules that the defendant's heavy burden is to prove an intentional selection, to the exclusion of others, and a purposeful discrimination, invidiously or in bad faith, and would not be presumed (A-20-21). The Supreme Court also noted that "the defendants did not establish that Hustler alone would be prosecuted" (A-22).

That no proof was given that further prosecutions would follow is obvious from the transcript of the hearing (A-29-139), and also in light of the intent to continue on the part of the witness-prosecutor, at A-103:

> My decision wouldn't be any different. I would be willing to prosecute, anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case.

As stated by this Court in Sunday Lake Iron Co. v. Wakefield, supra at 247 U.S., 353: "The good faith of such officers and the validity of their actions

are presumed; when assailed, the burden of proof is on the complaining party." The testimony of the assistant prosecutor and police officer, below, that "Hustler" was being used as a test case in this area is entitled to the weight given by the Court of Appeals and Ohio Supreme Court. Dissenting Justice Paul Brown of the Ohio Supreme Court presumes that the trial court made factual inferences of bad faith (A-23-26) and that the defendants met their burden of proving "intentional or purposeful discrimination". However, the trial court's Memorandum (A-6-7) specifically rejected the test case rationale as not part of the law of discriminatory prosecution. Judge Calandra found that there simply cannot be such thing as a test case. His ruling incorrectly assumes that mere selectivity is unlawful. It is this application of law which was reversed by the Court of

Appeals and Ohio Supreme Court. Dissenting Justice Brown searched the record and made his own factual conclusions that the prosecution was "(1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights" (A-25). These conclusions were not stated by the trial court and were held not to be proven by the record by the majority of the Ohio Supreme Court.

The contention of the Petitioners' Brief (at 25-29) that the Court of Appeals abused the traditional rule of deference to a trial court's factual findings are both untrue in this case and do not correctly recognize the law on this issue of appellate review.

The established general rule in Ohio is that a Court of Appeals has the power to weigh evidence and, on a properly presented question of law, has the duty to

weigh the trial court evidence. State v. De Righter, 145 Ohio St. 552, at 560, (1945); Cooper v. State, 121 Ohio St. 562, at 569 (1930); State v. Petro, 148 Ohio St. 473, at 500 (1947). See also: State v. Smith, 39 Ohio App.2d 190, at 195 (Hamilton County, 1974); and State v. Arrindella, 137 N.E.2d 136 (Per Curiam) (Hamilton County, 1956).

As such, the Court of Appeals is the last resort where the parties have a right to examination into the factual weight of the proof. Kramer v. Toledo & O. C. R. Co., 53 Ohio St. 436 (1895). The Supreme Court has been relieved of the duty to determine as to the weight of the evidence by Section 2953.02 of the Revised Code. State v. Martin, 164 Ohio St. 54 (1955); State v. Strozier, 32 Ohio St.2d 62, 64-65 (1972). The Supreme Court need only determine the legal questions concerning whether the proper rule of

proof and review was utilized by the Court of Appeals. Mentor v. Giordano, 9 Ohio St.2d 140 (1967); Rheinstrom v. Steiner, 69 Ohio St. 452 (1904); Elster v. Springfield, 49 Ohio St. 82 (1892).

The Cuyahoga County Court of Appeals, in this case, was not differing with the Cleveland Municipal Court on the credibility of the witnesses, but was ruling that the evidence presented did not amount to sufficient proof of "deliberate discrimination based on an unjustifiable standard". (Opinion of Court of Appeals at A-12.) This was a question of law and fact which is particularly within the province of the appeals court, as is their proper function.

The "well-settled rule of review" is, therefore, as stated above and as applied by the Court of Appeals and Ohio Supreme Court, rather than as alleged in the Petitioners Brief (A-25-29).

There simply is no factual controversy in the record or decisions in this case. The City of Cleveland's assistant prosecutor and police officers began this case to test our juries to this magazine. The admitted selection of "Hustler" as the first case was a valid exercise of discretion and allocation of resources. The trial court was incorrect in assuming that this selectivity was, in and of itself, enough to satisfy the test for relief under the Equal Protection and Due Process Clauses. Unless prevented from follow-up prosecutions by the assistant prosecutor's superiors, the intended general enforcement, as stated by the witness (A-103, 109-10, and 114), was entitled to acceptance. There has never been a hint that any of the superiors disapproved of this change in policy or would prevent further action if successful, and it was defendants' burden

to establish if this were the case. The trial court did not contradict this intent nor did his Memorandum (A-6) make findings which disagreed with or failed to apply this rationale. The trial judge simply concluded that he was not entitled to rely on this as a test case and that only generalized prosecution could suffice for an entry into this genre of magazines. These facts of selectivity, without malice or intent to continually select only "Hustler", do not meet the guidelines of Snowden v. Hughes, supra at 8, and Oyler v. Boles, supra at 456, as stated by the Ohio Supreme Court (A-20-21).

CONCLUSION

Mere selectivity in enforcement is not a denial of equal protection if based on some rational basis. That "Hustler" was picked as the first is no defense to a possible law violation and that "Hustler" is still the only such case pending is based upon our firm belief that extraditing owners from across the country or charging a few local merchants would be more unfair than establishing the limits of Cleveland's community standards with "Huslter". No improper movtive or classification was established or is evident in the record. The defendants would not have asked for a more open and responsive questioning of the assistant prosecutor and police. All our reasons and evidence was open for disclosure and the defendants failed to meet their burden of proving that or actions amounted to intentional and purposeful discrimination.

If the city prosecution staff were to prosecute all or several "adult" magazines of this type at one time, the burden in time and expense would be prohibitive. It seems only reasonable to test our community standards in a rational, deliberate method on a case-by-case basis. Such was the method adopted in this "Hustler" case.

The Petitioners established only preliminary selection, but it was not shown to be arbitrary or capricious. It certainly was not shown to be in bad faith, for purposes of harassment, or for obvious discrimination reasons.

Therefore the trial court's dismissal of the charges was not based upon sufficient legal justification, the Ohio Supreme Court and the County Court of Appeals were within their province and correct in remanding for trial, and this

Court should affirm these decisions and allow this matter to proceed trial.

For these reasons, the decisions of the Ohio Supreme Court and Court of Appeals should be affirmed.

Respectfully sumbitted,

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CERTIFICATE OF SERVICE

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No. 80-420

In The

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a *prima facie* case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the *prima facie* showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness's testimony, contrary to a well-established rule of review, deny the defendant equal protection of the law?

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I

In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed.

The brief submitted by the State of Ohio concentrates on the history of discriminatory prosecution, with a listing of cases in which the defense has been denied, rather than an application of the law of selective enforcement to the specific facts of this case. However, this lengthy discussion on the general topic fails to support an argument that the Supreme Court of Ohio ruled correctly. Therefore, in this reply brief, petitioners will concentrate primarily upon answering arguments made by the United States as *amicus curiae*, and where necessary, respond to certain claims made by respondent, State of Ohio.

Not a Test Case

Petitioners are confident that once this Court reviews the record, it will be convinced that they met both prongs of the test to establish illegal discriminatory prosecution in that (1) others similarly situated were not prosecuted for conduct similar to that for which petitioners were charged and further, that no steps, preliminary or otherwise, were taken to initiate obscenity charges against any publication other than *Hustler;* and (2) the *Hustler* prosecution was admittedly commenced because of adverse public reaction to a cartoon or indeed to the entire magazine itself.

As does the United States (*see infra*) respondent attempts to justify the prosecutor's illegal selection of *Hustler* alone on the ground that it was to be a test case for the City of Cleveland. No such conclusion of a test case can be drawn from the present record where not only did petitioners prove that there were no other similar publications under consideration by the prosecutor's office, they adduced evidence that the Assistant Law Director had made no preparation whatsoever for any subsequent prosecutions following the resolution of the purported test case. For example, the Assistant Law Director had not compiled a list of titles, business establishments, files, or taken any other steps which would lead one to genuinely believe

that the *Hustler* case was not going to be the first *and last* prosecution of a mens-sophisticate magazine with second-class mailing privileges. In supporting the choice of *Hustler* as the sole publication to prosecute, the state questions "[w]ould it truly matter to the First Amendment freedoms of speaking one's mind whether 'Hustler' goes first, or whether 'Hustler' and 'Penthouse', 'Swank' or another go first together?" (Respondent's Brief at 31, 32). Curiously, from this statement it would seem as if the city prosecutor had an entire list of other magazines to prosecute, following a successful *Hustler* test case. The proof, however, is to the contrary, in that there were no other prosecutions in any way even preliminarily contemplated and none have been initiated within the four years since the hearing (Respondent's Brief at 79).

In keeping with its unsupportable test-case claim, respondent argues that "[i]n Cleveland, all of the 'adult' theatres and bookstores were continually charged and the effort to broaden the scope of enforcement into the 'drugstore porn' industry is more in keeping with equal enforcement than a violation of equal protection" (Respondent's Brief at 56). However, no proof whatsoever exists on the present record as to respondent's claim of such enforcement. Moreover, Ohio's reliance upon the activities of the New York City Midtown Task Force is misplaced for that prosecuting agency concentrated on all sex-related establishments, instead of singling out just one, as did the Assistant Law Director in this case when he chose to prosecute *Hustler*. Contrary to respondent's statement (Respondent's Brief at 73), the trial court did not reject the test case rationale as part of the law of discriminatory prosecution. Rather, the trial judge merely rejected respondent's bogus claim that *Hustler* was a test case.

Petitioners must disagree with respondent's reason as to why *Hustler* remains — four years later — the only case of its type pending: "our firm belief that extraditing owners from across

the country or charging a few local merchants would be more unfair than establishing the limits of Cleveland's community standards with 'Hustler' " (Respondent's Brief at 79). On the contrary, Cleveland's apparent neglect of other magazines similar to *Hustler* proves that the prosecution has no intention of charging these other similar magazines and belies respondent's claim that the *Hustler* prosecution is a test case. Indeed, the failure to even purchase other magazines or prepare files on them indicates the absence of the City's intention to establish the community standards of Cleveland with the *Hustler* prosecution, and more correctly, its eleventh hour decision to seek sanctuary from dismissal by making a hollow test-case claim. Similarly, none of the arguments made by the United States in its *amicus* brief in favor of *Hustler*'s being a test case is any more compelling.*

Test Case Argument of *Amicus Curiae*

The United States relies heavily upon the Assistant Law Director's own testimony that the prosecution of petitioners for publishing *Hustler* is a test case. At page 7 of its brief, *amicus*

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*The United States maintains "that there is a substantial question regarding the Court's jurisdiction to hear this case" (Brief for the United States at 1). However, it is beyond question that this case deserves immediate attention from the Court for several reasons. First, the interests of certain defendants, who are currently awaiting prosecution and who arguably have been singled out for such prosecution because of their unpopular views or non-conformist activities, could be adversely affected in having to await the outcome of petitioners' trial in the absence of this Court's definitive statement on the issue of selective prosecution at this time. Moreover, since we are dealing here with selective prosecution vis-a-vis First Amendment expression, the chill on those who would speak, write, publish, or disseminate controversial ideas but refrain from doing so for fear that they may be the object of a prosecutor's unbridled, but as yet not definitely illegal, discretion is more than ample reason for this Court's consideration. Thus, these vital questions concerning the prosecutor's role deserve the immediate attention of this Court, which has jurisdiction to hear the case.

curiae states that this "prosecutor candidly admitted that this prosecution was a test case . . . ." The Government would want this Court to believe that the prosecutor's statement was a concession on some vital point. On the contrary, any such statement by the Assistant Law Director is self-serving because it is in Ohio's own interest to argue that the prosecution is a test case. Indeed, if the charges lodged against petitioners by the State of Ohio were not motivated by the test-case rationale, there is no legitimate explanation other than selective prosecution for respondent's action in charging *Hustler*.

More importantly, however, the proof is at odds with the last minute test-case claim, and indeed, the prosecutor was unable to adduce any corroborating evidence other than his own testimony, to support the nebulous claim of a test-case basis for instituting the prosecution. Not only were no "similar prosecutions [held] in abeyance" (Brief for the United States at 14), the Cleveland prosecutor's office had taken no steps to prepare for the cases that would necessarily follow the *Hustler* test case, if in fact it truly were a test case. For example, the Assistant Law Director had made no arrangements to identify other alleged offenders, purchase evidence, ascertain the places of business of the alleged offenders and determine if their publishers, if not in Ohio, could be extradited to the state.

We do not necessarily challenge a prosecutor's discretion in choosing to focus on one offender and designate that prosecution a test case. What is indefensible is for one in the position of the Assistant Law Director to state, when his actions and those of the police are to the contrary, that a prosecution, such as the present one, challenged on equal protection grounds, is merely the first of a series of several as yet to be announced obscenity prosecutions. It is merely too convenient for one apparently charged with the discretion to initiate prosecutions, to state that if the instant case is successful, he will commence other criminal suits, especially when *no* steps in this direction

have begun. Yet the Assistant Law Director maintains that the decision as to future prosecutions of other publications was yet to be made by his superiors. Clearly, then, it was not for one prosecutor alone to testify that the *Hustler* prosecution was a test case once the petitioners had demonstrated that it was the *only* case and that *no* others were being worked up. Therefore, once the petitioners made the initial showing, it was incumbent upon the Assistant Law Director to call his superiors to present proof that if the *Hustler* prosecution was successful, other cases would immediately follow. The absence of any evidence that *Hustler* was a test case mandates a finding that the state did not rebut petitioner's showing that *Hustler* was impermissibly singled out over countless similar alleged violators of the obscenity laws.

Illegal Prosecutorial Motivation

A thorough review of the record of the February 28, 1977 hearing reveals that the Assistant Law Director's testimony wavered considerably as to whether or not charges were initiated against petitioners due to citizen disapproval of a constitutionally protected cartoon. The trial judge was witness to Mr. Taylor's statements, and in dismissing the charges, he necessarily credited that portion of Mr. Taylor's testimony which attributed the prosecution of petitioners to community disapproval of their publication. Thus, contrary to the Government's claim (Brief for the United States at 20), the evidence was *not* uncontradicted that the prosecution was not based on reaction to the political cartoon.

The United States urges that citizens mailing copies of a *Hustler* issue to the pornography unit of the Cleveland Police Department was a justifiable basis for the prosecutor's decision to charge petitioners. Of course, the behavior of the police in acting upon these citizen complaints by taking the magazine to the prosecutor and recommending prosecution must be at-

tributed to the state. The United States concedes that selecting *Hustler* to prosecute on the ground of a constitutionally protected political cartoon which received public disapproval would be the exercise of prosecutorial discretion based upon an invidious classification. Yet a much more critical and potentially far-reaching issue is raised by maintaining that citizen disapproval of the magazine is a justifiable basis for the prosecution.

We are forced to ask whether it is any more permissible for a prosecutor to initiate charges against a presumptively protected publication — no more explicit than scores of others available in the community — merely because of vocal adverse citizen reaction, possibly of a citizen or group that does not represent the general standards of the community.* We are certain that the Court would not answer this question in the affirmative, for it would undermine this Court's decision in *Miller v. California*, 413 U.S. 15 (1973). Accordingly, petitioners strongly disagree with the argument of the United States that "since the determination of obscenity vel non turns on 'contemporary community standards of the community' [citations omitted], consideration of the public reaction to the prurient aspects of petitioners' magazine seems particularly appropriate" (Brief for the United States at 22). The Government's position is patently erroneous since, if applied, it would mean prosecuting the unpopular or irreverent publication as determined by a vocal minority, a concept foreign to the *Miller* formulation and one which would seriously undermine if not destroy the principles sought to be protected by the First Amendment.

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*Even if a "corrupt or invidious prosecutor is amenable to professional discipline and criminal liability . . ." (Brief for the United States at 11), this minor sanction matters little in the sensitive area of First Amendment expression. It is no consolation to those whose speech has been chilled in the interim years after the initial illegal exercise of prosecutorial discretion that the prosecutor may receive some form of "professional discipline."

Choosing a more well-known magazine to charge is punishing a defendant because it amounts to penalizing him for his success. Indeed, *Hustler*'s level of notoriety stems from its degree of acceptance, which is measured by the significant number of sales of the magazine in the community. Unlike the notorious tax protester, petitioners have not acknowledged the willful nature of any offense for it is their position below and in this Court that *Hustler* is not obscene but in fact is constitutionally protected.* Moreover, unlike the notorious tax protester who publicizes his willful evasion, petitioners have done nothing themselves, other than engage in presumptively protected First Amendment activities, to initiate any prosecution against themselves.

Proper Use of Prosecutorial Discretion

The evidence adduced at the hearing does not establish that the prosecution against *Hustler* was motivated by the test-case rationale. Rather, it clearly shows that *Hustler* was impermissibly singled out for prosecution above countless other publications of a similar and even more explicit nature either because of citizen reaction to a constitutionally protected cartoon or vocal citizen disapproval of the magazine's alleged "offensiveness." If such abuse of prosecutorial discretion is sustained, we will be witness to a parade of horrors where prosecutors will be given free rein to persecute those who are more vocal in voicing controversial opinions and ideas, those who have adopted a different lifestyle than that of the majority, or those who exercise their constitutional freedoms to the fullest. The prosecutor should truly have discretion in that he should not feel obliged to answer to certain segments of the

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*References by *amicus* and respondent to the contrary are based upon a statement in the trial court's decision regarding obscenity which obviously was not meant to be on the merits since the obscenity *vel non* of *Hustler* has not yet been placed in issue.

populace. However, because there exists the danger that a prosecuting official who is elected by the community views it in his best political interests to cater, consciously or unconsciously, to the expressed opinions of the vocal but perhaps minority of the electorate, we must look to the courts to check any prosecutorial discretion which is not motivated by solely legal considerations.

To be sure, a defendant alleging illegal selective enforcement of the criminal laws bears the initial burden of establishing that a prosecution was launched against him while others similarly situated of whom the prosecutor is aware remain untouched, and that the prosecutor has relied upon an illegal factor in making his decision to prosecute the defendant. But once the defendant has made his initial showing, the prosecutor cannot rebut the presumption of discriminatory prosecution by merely stating that the case in question is a "test case." The prosecuting official must come forward with evidence to support this claim, for only a *definitive* finding of test case will rebut the presumption. No such proof of test case exists on this record.

In the absence of a legally sufficient rebuttal to a defendant's claim of discriminatory prosecution, a trial court is obliged to dismiss the charges. Should a dismissal be legally mandated, however, the legitimate prosecutorial discretion, which is a cornerstone of our criminal law, will remain intact. The system that investigates and prosecutes criminal violators will not be hindered in its task — indeed, it will be strengthened, for those who are selected for the dubious honor of prosecution can feel secure, at least, that offenders of the same class and circumstances will not be passed over. The conscious discrimination by the Ohio authorities in this case in prosecuting *Hustler* alone because of disapproval of the manner in which the magazine's publishers exercised their First Amendment rights "taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the . . . action" (*303 West 42nd Street Corporation v. Klein*, 46 N.Y.2d 686, 694, 416 N.Y.S.2d 219, 223 [1979]).

Constant patrol by the courts of the zone of prosecutorial discretion will not only insure greater respect for laws which will be thus administered with an impartial eye and an even hand, it will also guarantee the unfettered exercise of First Amendment rights by all citizens. Selectivity of prosecution deserves the highest degree of scrutiny in the free speech area because controversial expression is more easily chilled than other activities. It is indefensible for a prosecutor who has selected one constitutionally protected publication or film alone (from among a group of similar embodiments of expression) because he finds the publication or film offensive or because some portion of the electorate has voiced disapproval of the material, to sustain his unconstitutional choice on the theory that it is a test case. Before the test case excuse can be found to rebut the presumption of illegal selective enforcement which a defendant has established, the prosecutor himself must adduce credible evidence that he has laid the groundwork for the subsequent prosecutions and adduce corroborating proof that the challenged prosecution is indeed the first, not the first, last, and only. Only when this evidence is brought forth can we be certain that the prosecutor has not overstepped the boundaries of his office. And only when courts refuse to sanction the improper singling out of one offender, chosen on an impermissible factor, can every citizen feel confident that the freedom to exercise his constitutional rights will remain unabridged.

Conclusion

In urging reversal of the judgment below, petitioners look to this Court merely to apply its own time-honored and well-honed doctrine of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which has become the sanctuary of the controversial, the outspoken, the philosophically unpopular, and all those "different" people or groups against whom a prosecutor may be tempted to exert the power of his office. Of course, a prosecuting attorney can legitimately exercise a certain amount of discretion with respect

to the cases he selects so long as his conscious bypassing of certain wrongdoers and the singling out of others is not based upon consideration of such factors as race, religion, or the extent to which the chosen violators are politically or morally unpopular for the vocal or notorious exercise of their constitutional rights. A condemnation of these unconscionable prosecutorial practices will in no way impair or impede the exercise of legitimate prosecutorial discretion or result in unwarranted dismissal of criminal complaints against culprits merely because some other miscreant was not similarly charged, for reasons wholly rational and unrelated to the doctrine of illegal selective enforcement.

Petitioners established through the cross examination of the Cleveland official imbued with the authority to determine the obscenity cases to prosecute that (1) their publication was the only such magazine selected for prosecution, and more than four years following the initial charge, remains the single publication of its type (national men's magazine with second class mailing privileges) to be so charged; (2) the prosecutor was well aware of other similar magazines but no police action, not even the most preliminary in nature, was taken against these similarly prominent alleged violators; and (3) *Hustler* was singled out because of community disapproval of a constitutionally protected cartoon which had caused citizen complaints to the police, who in turn relayed this community disapproval to the prosecutor. Upon unequivocally establishing these facts, petitioners had presented a *prima facie* case of illegal discriminatory prosecution mandating, in the absence of rebuttal evidence, the dismissal of the charges. Since the trial court properly rejected respondent's tenuous and unsupported claim that the *Hustler* prosecution was a test case, the trial court's judgment must be reinstated.

Such corrective action by the Court is thoroughly justified by the record below and the authorities cited herein. Moreover, it

will act as yet another reaffirmation of *Yick Wo, supra*, which statement seems sorely needed in these times when the outspoken practitioner of First Amendment free expression is too often the scapegoat of the police and prosecutor. Not only will strict adherence to the rule benefit the controversial public figures wrongly singled out on invidious grounds, it will provide a standard by which all men and women charged can measure the conduct of the prosecutor. Once this Court refuses to condone the illegal enforcement that occurred below, we are confident that prosecutors across the land will take the necessary care in the exercise of their potent power to ensure that the laws which affect the lives of ordinary citizens will be enforced evenhandedly. A byproduct of this new prosecutorial caution will be a greater respect for law enforcement in general. Moreover, once prosecutors abide by the rule prohibiting selection of a certain defendant based upon an invidious factor, the incidence of necessary but sometimes time-consuming defense-requested hearings on selective prosecution grounds should abate.

Nevertheless, the substantive rule urged here would permit one in the position of petitioners to establish his illegal selection, thereby rightfully shifting the burden to the state or federal government to rebut the initial showing of illegal motive. This is as it should be since the prosecutor's knowledge and reasoning is exclusively within his control. Petitioners made their requisite showing, unrebutted by the state, only to find that an appellate court disobeyed the most fundamental rules of appellate review and refused to accept the findings of the trial court.

We are confident that this Court will read the record with no preconceived notions, as apparently did the appellate courts below, and sustain the trial court's determination, thus rendering impossible the prosecution of one who has been selected with the prosecutorial "uneven hand" and "evil eye."

For all the foregoing reasons and authorities, those set forth in petitioners' opening brief and those to be presented at the time of oral argument, it is respectfully requested that the judgment below be reversed and that of the Cleveland Municipal Court be reinstated.

Respectfully submitted,

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No. 80-420

In the Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT, ET AL., PETITIONERS

v.

STATE OF OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether the prosecution of petitioners as a test case constitutes an impermissible selective prosecution.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the selective prosecution issues presented by this case. Such claims are frequently made with regard to federal prosecutions and enforcement proceedings, particularly in cases involving tax, draft, and census protestors, and others who claim that their unlawful activities are constitutionally protected. In addition, in the exercise of prosecutorial discretion, the United States and various federal regulatory agencies have often initiated "test cases" as a means of conserving and efficiently allocating prosecutorial resources. The determination of the proper burden of proof in and the elements of a selective prosecution claim are thus important issues potentially affecting numerous federal proceedings.

JURISDICTION

The United States believes that there is a substantial question regarding the Court's jurisdiction to hear this case. 28 U.S.C. 1257(3) empowers the Court to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State." Here, however, although the decision below finally determines the federal question presented by petitioners, the case is interlocutory in nature. The Ohio Supreme Court has remanded the case for trial. If petitioners are acquitted at trial, this Court need not determine the selective prosecution issued raised by petitioners. If, on the other hand, petitioners are convicted and their convictions affirmed, they may raise all of their federal questions, including the issue of obscenity, for review by this Court at that time.

To be sure, this Court has construed Section 1257 flexibly, and, particularly in First Amendment cases involving issues of general applicability to the press, it has on several occasions undertaken review of cases

in an interlocutory phase. See *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277-279 (1980); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 246-274 (1974); *Mills* v. *Alabama*, 384 U.S. 214, 217-218 (1966). But "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." *Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 477.*

STATEMENT

1. In July 1976, petitioners were arrested on misdemeanor charges of pandering obscene materials, in violation of Ohio Rev. Code Ann. § 2907.32 (Page 1979 Supp.). Prior to trial, petitioners moved to dismiss the complaint on the ground that the prosecutor in Cuyahoga County had impermissibly selected the publishers and editors of *Hustler* magazine for prosecution while not prosecuting the officials of allegedly

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*We further note that the First Amendment issue presented at this stage of the present case is qualitatively different from those found to support a conclusion of finality in such cases as *Cohn* and *Tornillo*. In those cases, publishers were challenging the validity of state statutes of general application with a direct and continuing impact on speech activities, and the Court accordingly perceived a commanding need to provide a prompt ruling after final state court disposition of the federal claim. Here, by contrast, the First Amendment component of petitioners' equal protection claim—that they were improperly selected for prosecution because of publication of a political cartoon—turns upon an isolated historical fact. Far from implicating broad-based First Amendment interests of the press generally, the claim that other publishers are *not* being prosecuted does not require the immediate attention of this Court in order to protect federal interests that could be adversely affected by awaiting the outcome of petitioners' trial.

similar magazines such as *Club*, *Oui*, *Playboy* and other publications. Petitioners asserted that these other magazines had been distributed openly in Cuyahoga County for a longer period of time than had *Hustler*, and that their content was indistinguishable from the content of *Hustler*. Petitioners claimed that the case against them constituted an impermissible selective prosecution violating their rights under the Equal Protection Clause of the Fourteenth Amendment.

On February 28, 1977, a hearing was held in the Cleveland Municipal Court regarding petitioners' motion to dismiss. The prosecutor testified that although there had been other pornography prosecutions involving materials similar to *Hustler* (A-40, A-43 to A-45, A-48 to A-50, A-54, A-57, A-80 to A-82, A-109), *Hustler* "was the first one we went after that was nationally distributed, and was a second class mailing privilege type magazine" (A-57; see A-85). Acknowledging that he had made the decision to prosecute petitioners, the county prosecutor further stated that other nationally distributed magazines had been investigated, and that he would be inclined to prosecute those publications if this prosecution were successful (A-85 to A-86, A-89 to A-92, A-102 to A-105). He added, however, that his superiors, who were also waiting to see the results in this case, were currently discussing future prosecutions, and that they, rather than he, would make any decision to initiate future prosecutions in this area because this prosecution had involved an unusually large amount of time and publicity (A-85 to A-86, A-96 to A-98, A-102 to A-105).

The prosecutor also explained, without contradiction, why he had selected *Hustler* as a test case. He observed that the July 1976 issue of *Hustler* had been

the subject of several public complaints and that an anonymous person had sent a copy of that issue to the authorities (A-55 to A-60; see also A-124 to A-125). He acknowledged that some of the public's complaints had focused on a particular cartoon depicting various political figures engaging in sexual acts with the Statute of Liberty, but he testified that he had prosecuted petitioners despite and not because of that cartoon, which he believed to be constitutionally protected (A-55 to A-60, A-67). The prosecuting attorney also suggested that in his view *Hustler* was more offensive and vulgar than the other nationally distributed magazines with which he was familiar (A-89 to A-92). Finally, the prosecutor stated that he had chosen *Hustler* because it is an Ohio corporation and its officers were therefore readily available for prosecution in Ohio (A-109 to A-114). He noted that a prosecution for pandering obscene materials was a misdemeanor and not a felony, and that, as far as he was aware, he could not seek interstate rendition of persons residing outside Ohio to stand trial on misdemeanor charges (*ibid.*).

2. On May 17, 1977, the trial court granted petitioners' motion to dismiss (Pet. App. 36a-39a).[1] The court stated that this prosecution was the first of its kind and "that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case" (*id.* at 38a). Although generally accepting the prosecutor's testimony (*id.* at 37a, 39a), the court held as a matter of law that the prosecution of petitioners violates the Equal Protection Clause because the authorities had failed to initiate prosecutions against other magazines that are similar in content. The court stated that "[i]t is

[1] The court had previously ruled that the Ohio obscenity statute was valid and that the two issues of *Hustler* in question are obscene (A-36).

legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*ibid.*).

3. On the State's appeal, the Ohio Court of Appeals reversed (Pet. App. 19a-33a). The court first observed that although there had been two other prosecutions and various investigations of materials similar to *Hustler*, the state prosecutors were not actively prosecuting all magazines comparable to *Hustler* (*id.* at 21a-23a). The court noted, however, that mere selectivity in enforcement does not violate the Equal Protection Clause and that petitioners had the heavy burden of demonstrating intentional and invidious discrimination (*id.* at 25a-29a). The court specifically concluded that test cases are appropriate so long as the prosecutor intends generally to enforce the law against other similarly situated "offenders" if the test case proves successful (*id.* at 28a-29a).

Applying these standards to this case, the court of appeals concluded that petitioners had sufficiently established that this prosecution is a test case and that the prosecutor had not yet prosecuted other magazines that he knew to be similar in format to *Hustler* (Pet. App. 29a). The court further found that the selection of *Hustler* was not based on invidious or impermissible grounds. In particular, the court determined that although public reaction to the political cartoon had, in part, brought the magazine to the prosecutor's attention, that cartoon was not the basis of the prosecution (*id.* at 29a). Rather, the prosecutor had selected *Hustler* because it was more offensive than other similar magazines and because *Hustler's* officers are domiciled in Ohio (*id.* at 29a-30a). Noting that the respondent was considering future prosecutions against similar magazines (*id.* at 23a-24a, 30a-31a), the court held that petitioners had not proved "that *Hustler* alone would be prose-

cuted, much less that this selectivity was based on constitutionally prohibited discrimination" (*id.* at 31a). The court indicated that petitioners should have presented the testimony of those responsible for future prosecutorial policy in this area (*id.* at 31a-32a).

4. In a per curiam opinion, the Ohio Supreme Court affirmed, with one judge dissenting (Pet. App. 1a-18a). The court emphasized that "conscious exercise of some selectivity in enforcement is not in itself * * * a violation of the United States Constitution" (*id.* at 5a). The court explained that in order to establish a selective prosecution claim, a defendant has a heavy burden of proving that others similarly situated have not been prosecuted and that the exercise of prosecutorial discretion is based on invidious or impermissible factors (*id.* at 6a-7a). The court found that here the testimony showed that the test case against *Hustler* was predicated on appropriate considerations, including *Hustler's* relative offensiveness and the in-state domicile of petitioners (*id.* at 7a-8a). In addition, the court determined that petitioners had not established that *Hustler* alone would be prosecuted (*id.* at 9a).

SUMMARY OF ARGUMENT

Petitioners contend that an otherwise valid state prosecution against them should be dismissed because it constitutes an impermissible selective prosecution. It is well settled, however, that the conscious exercise of selectivity in enforcement matters does not by itself violate the Equal Protection Clause of the Fourteenth Amendment. Rather, petitioners have a heavy burden of establishing that others similarly situated have not been and will not be prosecuted and that the selection of them for prosecution is deliberately based

upon an unjustifiable criterion such as race, religion, or other invidious classification. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124-125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). Petitioners' allegations and proof fall far short of the mark.

First, as the court below concluded, petitioners have not demonstrated that similar offenders will not be charged by respondent in the future. To be sure, the state prosecutor candidly admitted that this prosecution was a test case against a nationally distributed magazine with second-class mailing privileges. He further stated, however, that he would be willing to prosecute other similar magazines if this prosecution were successful and that such prosecutions were currently being considered by his superiors. Thus, even assuming that petitioners' magazine cannot be distinguished from other periodicals, the evidence shows that petitioners are merely the first to be prosecuted, and not that they will necessarily be the only persons among similarly situated offenders to be charged. Such a bona fide use of a test case in order to secure a definitive legal ruling while conserving prosecutorial resources does not offend the Equal Protection Clause. See, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *MacKay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94 (1919).

Moreover, the prosecution of petitioners for pandering obscene materials was not predicated on any invidious or impermissible factor. Petitioners erroneously suggest that they were charged because they published a constitutionally protected political cartoon in the magazine issue in question. But the evidence on which petitioners rely shows only that some of the members of the public who made complaints about

petitioners' magazine expressed their distaste for that cartoon. Petitioners did not demonstrate, however, that the apparent motivation of some of the private citizens who reported or complained about petitioners' alleged crime could appropriately be attributed to the State's decision to prosecute. To the contrary, the uncontradicted testimony of the prosecuting attorney makes clear that this prosecution was initiated despite and not because of that cartoon. Furthermore, petitioners may not be heard to complain because their purposeful illegal activities have achieved greater notoriety than other alleged offenders. Particularly in the context of obscenity, which concerns community standards, prosecutorial decision-making may be based on public disapproval and concern.

Finally, even if petitioners sufficiently established a prima facie case of selective prosecution, the prosecuting attorney's testimony overwhelmingly rebutted their claim. As indicated above, petitioners' magazine was the subject of several public complaints. The prosecutor accordingly investigated the object of those complaints as well as other allegedly similar magazines. He then determined to prosecute petitioners' magazine as a test because he considered it to be more offensive than other magazines—in other words a more serious breach of the law. In addition, the prosecutor observed that *Hustler* is an Ohio corporation and that its officers are domiciled in Ohio and readily subject to prosecution, whereas other nationally published magazines are headquartered outside the State. Because no invidious or impermissible factor was thus the "but for" cause of petitioners' prosecution, the Ohio Supreme Court correctly declined to dismiss the charges against petitioners. See *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977).

ARGUMENT

THE PROSECUTION OF PETITIONERS AS A TEST CASE WAS NOT INVIDIOUSLY BASED AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Petitioners Have A Heavy Burden of Establishing That The State's Exercise Of Prosecutorial Discretion Constitutes An Impermissible Classification

1. *Introduction.* This case concerns the constitutional limitations on the exercise of prosecutorial discretion. Although both state and federal prosecutors are unquestionably subject to constitutional constraints, they have traditionally enjoyed wide ranging discretion regarding whether to prosecute, what charges to bring, and when to bring them. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).[2] This extremely broad rule of judicial deference is designed to ensure prosecutorial independence and flexibility and reflects "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute." *Inmates of Attica Cor-*

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[2] Indeed, in the federal system, a prosecutor's decision not to bring criminal charges is not subject to judicial review at all. See *United States* v. *Nixon, supra*, 418 U.S. at 693; *Confiscation Cases, supra; United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). See also *Butz* v. *Economou*, 438 U.S. 478, 515 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 438 (1976) (White, J., concurring); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618-619 (1973). But cf. *National Black Police Ass'n* v. *Velde*, 631 F.2d 784 (D.C. Cir. 1980) (administrative prosecutor may be personally liable for failing to initiate suit), petition for cert. pending, No. 80-1074.

rectional Facility v. *Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973). See, *e.g.*, *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364-365; *United States* v. *Lovasco*, 431 U.S. 783, 793-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-426 (1976); ABA Project on Standards for Criminal Justice, *The Prosecution Function and The Defense Function* § 3.9 (Approved Draft, 1971). As Chief Justice (then Judge) Burger has observed (*Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)), "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

Moreover, even if feasible, sweeping judicial supervision of the prosecutorial function would interfere with the administration of justice, and, at least in the federal system, would run afoul of the separation of powers doctrine. See *United States* v. *Nixon*, *supra*, 418 U.S. at 693; *Confiscation Cases*, *supra*; *United States* v. *Torquato*, 602 F.2d 564, 569 (3d Cir. 1979); *Inmates of Attica Correctional Facility* v. *Rockefeller*, *supra*, 477 F.2d at 379-380; *United States* v. *Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Many defendants could with relative ease make selective prosecution claims in an attempt to delay and derail bona fide prosecutions and to discover details of the prosecutor's case prior to trial. If a prosecutor were required to defend every charging decision, processing even frivolous challenges to the exercise of prosecutorial discretion would involve substantial judicial and prosecutorial resources. Furthermore, strict ju-

dicial scrutiny of prosecutorial decision-making might well compel prosecutors to adopt excessively rigid prosecutorial policies in lieu of the traditionally flexible approach to these matters that has previously served the public interest. See, *e.g.*, *United States* v. *Lovasco*, *supra*, 431 U.S. at 794-795; Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427 (1960); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1119-1120 (1961).

At the same time, extensive judicial scrutiny of prosecutorial decision-making would not sufficiently add to the protections against prosecutorial overreaching already enjoyed by defendants to justify its manifest costs. Cf. *FTC* v. *Standard Oil Co. of Cal.*, No. 79-900 (Dec. 15, 1980), slip op. 12-14. Both the jury and the trial judge make independent determinations regarding the merits of a particular prosecution and thus act as substantial checks on the prosecutor. See *United States* v. *Batchelder*, *supra*, 442 U.S. at 125; *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. See also *Butz* v. *Economou*, 438 U.S. 478, 515-517 (1978). Furthermore, a criminal conviction may be reviewed in appropriate appellate and collateral proceedings. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. See also *FTC* v. *Standard Oil Co. of Cal.*, *supra*, slip op. 12-14. In addition, a corrupt or invidious prosecutor is amenable to professional discipline and criminal liability, and may be directly or indirectly accountable to the electorate. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429.

2. *Equal Protection Limitations.* For the foregoing reasons, this Court has repeatedly accorded a great deference to the prosecutor's decision to charge a defendant. See, *e.g.*, *United States* v. *Batchelder*, *supra*; *Bordenkircher* v. *Hayes*, *supra*; *Oyler* v. *Boles*,

368 U.S. 448, 456 (1962); *Rosenberg* v. *United States*, 346 U.S. 273, 294 (1953) (Clark, J., concurring). To be sure, the Equal Protection Clause imposes limits on the exercise of prosecutorial discretion. But "the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979). See, *e.g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *Akins* v. *Texas*, 325 U.S. 398, 404-405 (1945). Accordingly, a prosecutor's inadvertent disparity in treatment of similarly situated offenders does not violate the Equal Protection Clause. *Oyler* v. *Boles*, *supra*, 368 U.S. at 456. Furthermore, " 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364, quoting from *Oyler* v. *Boles*, *supra*, 368 U.S. at 456. See, *e.g.*, *United States* v. *Batchelder*, *supra*, 442 U.S. at 123-125 & n.9; *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944).

Thus, in order to establish a discriminatory prosecution claim, the defendant must demonstrate that the prosecutor has purposefully determined to prosecute him without intending to prosecute other similarly situated offenders, and that this intentional and knowing selection is based on invidious or impermissible factors. See, *e.g.*, *Oyler* v. *Boles*, *supra*; *United States* v. *Niemiec*, 611 F.2d 1207, 1209 (7th Cir. 1980); *United States* v. *Catlett*, 584 F.2d 864, 865-866 (8th Cir. 1978); *United States* v. *Kahl*, 583 F.2d 1351, 1353-1354 (5th Cir. 1978). As in other equal protection contexts, the official act of initiating

a prosecution is entitled to a presumption of regularity, and the defendant, as the allegedly aggrieved party, bears the heavy burden of pleading and proving that the otherwise valid charges are the product of intentional and invidious discrimination. See, *e.g.*, *Mobile* v. *Bolden*, 446 U.S. 55, 66-67 (1980) (plurality opinion); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Oyler* v. *Boles*, *supra*; *Snowden* v. *Hughes*, *supra*; *United States* v. *Ojala*, 544 F.2d 940, 943 (8th Cir. 1976); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

Finally, if the defendant meets this burden and establishes a prima facie case of discriminatory prosecution, the burden then shifts to the State to rebut this evidence and to show that the impermissible factor is not the "but for" cause of the prosecution. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 320-321 n.54 (1978) (opinion of Powell, J.); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-286 (1977); *Washington* v. *Davis*, *supra*, 426 U.S. at 241; *United States* v. *Falk*, 479 F.2d 616, 620-621 (7th Cir. 1973); *United States* v. *Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972). See also *Parker* v. *North Carolina*, 397 U.S. 790, 796 (1970); *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963). As we now demonstrate, application of these standards to this case compels the conclusion that petitioners' claims are insubstantial.

B. A Prosecutor May Randomly Select One Of Several Similarly Situated Offenders As A Test Case

1. The trial court dismissed petitioners' prosecution solely because "no other similar prosecution had been initiated either prior or subsequent to the

charges filed in this case" (Pet. App. 38a). In the trial court's view, "[i]t is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*id.* at 39a). In other words, the trial court held that a prosecutor may not in good faith select a test case among similarly situated offenders, while holding other similar prosecutions in abeyance pending the results in the test case. Neither logic nor precedent supports this conclusion. See, *e.g.*, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251-252 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); *Mackay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94, 100 (1919); *Cook* v. *City of Price*, 566 F.2d 699, 701 (10th Cir. 1977); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *People* v. *Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962).

In many situations, application of the law to a class of potential offenders or to a particular type of activity may be uncertain. For example, the coverage of a newly enacted statute banning the sale of drug paraphernalia may be unclear as applied to the numerous vendors of pipes and cigarette papers. Or a law clear on its face and covering a multitude of persons or establishments, such as a Sunday "blue" law or a mandatory draft provision covering males only, may be of doubtful constitutionality. See *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 588-589 (1961); *Broad-Grace Arcade Corp.* v. *Bright*, 48 F.2d 348, 352 (E.D. Va.), aff'd per curiam, 284 U.S. 588 (1931). In short, a prosecutor will often have a good faith doubt whether the courts will ultimately uphold his legal theory or grant the relief he seeks. And in many of those cases,

his doubts will apply to a broad range of similarly situated persons or establishments. Likewise, a prosecutor may lack the necessary resources to prosecute all known offenders.

Where application of the law is thus uncertain or where the prosecutor is unable to prosecute all offenders at once, selection of a test case in order to obtain a definitive legal ruling and to deter future offenses is an appropriate and heretofore accepted prosecutorial strategy. See, *e.g.*, *Mackay Telegraph & Cable Co.* v. *Little Rock*, *supra*, 250 U.S. at 100; *Cook* v. *City of Price*, *supra*, 566 F.2d at 701; *People* v. *Utica Daw's Drug Co.*, 225 N.Y.S.2d at 136. If the test case proves unsuccessful either in result or in cost of prosecution, the prosecutor will not have unnecessarily expended limited judicial and prosecutorial resources on a series of unsuccessful cases, and numerous potential defendants will have been spared the time and expense of trial.[3] On the other hand, if the test case proves successful, other prosecutions may be unnecessary because many offenders will cease violating the now established rule of law. Indeed, where the class of offenders is extremely large or where each prosecution requires the expenditure of substantial prosecutorial resources, use of a publicized test case may be the only practical means of enforcing the law.[4]

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[3] After obtaining a conviction in a test case, a prosecutor could well determine that the unexpected duration and cost of such a proceeding greatly exceeded its social value. In these circumstances as well, the prosecutor's determination to decline further prosecutions would not violate the Equal Protection Clause. See Comment, *supra*, 61 Colum. L. Rev. at 1119-1120.

[4] For example, successfully enforcing a Sunday "blue" law against a large retailer would undoubtedly result in the subsequent closing of most retail establishments on Sundays.

Furthermore, even if additional prosecutions are required or warranted, the precedent established in the test case will undoubtedly facilitate subsequent proceedings and may well induce guilty pleas by offenders who would otherwise have litigated the previously unsettled point of law.

Accordingly, the courts have uniformly endorsed the use of test cases. In *Mackay Telegraph & Cable Co.* v. *Little Rock, supra,* for example, the defendant in a tax enforcement proceeding claimed that the selective enforcement of the tax provision in question violated its rights under the Equal Protection Clause, because the city had failed to prosecute two other cable companies. 250 U.S. at 100. This Court unanimously rejected this claim, observing that "the present action was a test case to determine whether the license fees were applicable * * * with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense" (*ibid.*). See also, *e.g.*, *FTC* v. *Universal-Rundle Corp., supra; Moog Industries, Inc.* v. *FTC, supra; Cook* v. *City of Price, supra; United States* v. *Leggett & Platt, Inc., supra; People* v. *Utica Daw's Drug Co., supra.* Indeed, where the prosecutor intends generally to enforce the law upon successful completion of the test case, the defendant charged in that proceeding cannot meaningfully be said to have been treated differently from other members of his class for purposes of the Fourteenth Amendment. See *Personnel Administrator* v. *Feeney, supra,* 442 U.S. at 273; *Washington* v. *Davis, supra,* 426 U.S. at 245.

2. Petitioners contend (Br. 15, 20, 23) that their prosecution was not a bona fide test case. But the prosecuting attorney testified without contradiction that while petitioners' magazine "was the first one

we went after that was nationally distributed, and was a second-class-mailing-privilege type magazine" (A-57), he would be inclined to prosecute other similar magazines in the future if this prosecution were successful (A-85 to A-86, A-89 to A-92, A-102 to A-105). The prosecutor also candidly admitted that this prosecution involved substantially more time, cost, and publicity than previous prosecutions, and that his superiors, who were awaiting the results in this case, would make the determination to proceed with future prosecutions. Thus, as both the Ohio Court of Appeals (Pet. App. 31a) and the Ohio Supreme Court (*id.* at 9a) expressly concluded, petitioners, who bear the burden of proof, failed to establish that they alone would be prosecuted.[5] In the absence of unusual circumstances not present here, this Court should not review or disturb these concurrent factual findings of the lower courts. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In our view, moreover, the facts of this case underscore the conclusion that test cases are both proper and necessary. The prosecutor selected one of perhaps as many as 75 nationally published, second-class-mailing-privilege magazines that follow formats and contain materials similar to those used in *Hustler* (A-83 to A-87). Prosecution of any of the publishers of these magazines involves substantially

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[5] Petitioners suggest (Br. 22-23, 25-29) that the trial court rejected the prosecutor's testimony regarding future prosecutions. To the contrary, however, that court generally accepted the prosecutor's testimony (Pet. App. 37a-38a, 39a), and it apparently accepted his testimony on this point, concluding only that "[i]t is *legally* insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action" (*id.* at 39a; emphasis supplied).

greater expenditures of time and money than the prosecution of the distributors of more clearly obscene materials that had previously been undertaken by respondent (A-102 to A-103). If the community (*i.e.*, the jury) or the courts adjudged this kind of material to be constitutionally protected, further expensive prosecutions would be unwarranted. Alternatively, the prosecuting attorney anticipated that if this case were successful, further prosecutions might be unnecessary since at least one major magazine distributor, who had previously carried *Hustler* and other similar magazines, had indicated that he would cease distribution at that time (A-95). And even if further prosecutions were warranted and economically feasible, a definitive ruling of the Ohio courts that the Ohio statute could constitutionally be applied to magazines such as *Hustler* would undoubtedly simplify such prosecutions.

C. Petitioners Have In Any Event Failed To Prove That This Prosecution Was Motivated By Invidious Or Impermissible Factors

Even if it be assumed that this prosecution is not a bona fide test case and that respondent has no intent generally to enforce the law, petitioners' claim of discriminatory prosecution fails for still another reason—petitioners' failure to establish that the decision to prosecute was based on invidious or impermissible considerations, which is an essential element of a discriminatory prosecution claim. *United States* v. *Batchelder*, *supra*, 442 U.S. at 125 n.9; *Oyler* v. *Boles*, *supra*, 368 U.S. at 456; *Snowden* v. *Hughes*, *supra*, 321 U.S. at 8. See *Mobile* v. *Bolden*, *supra*, 446 U.S. at 66-67; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 264-265;

Washington v. *Davis*, *supra*.[6] Both the Ohio Court of Appeals and the Ohio Supreme Court[7] correctly determined that no such proof appears in this case (Pet. App. 7a-9a, 29a-31a).[8]

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[6] Every court of appeals has held that the defendant bears a heavy burden of establishing the prosecutor's improper or invidious motivation. See, *e.g.*, *United States* v. *Wilson*, Nos. 80-1255 and 80-1256 (9th Cir. Feb. 9, 1981), slip op. 313; *United States* v. *Diggs*, 613 F.2d 988, 1003 (D.C. Cir. 1979), cert. denied, No. 79-1343 (June 2, 1980); *United States* v. *Niemiec*, *supra*, 611 F.2d at 1209 (7th Cir.); *United States* v. *Torquato*, 602 F.2d 564, 568-569 (3d Cir. 1979); *United States* v. *Catlett*, *supra*, 584 F.2d at 866 (8th Cir.); *United States* v. *Johnson*, 577 F.2d 1304, 1308-1309 (5th Cir. 1978); *Cook* v. *City of Price*, *supra*, 566 F.2d at 701 (10th Cir.); *United States* v. *Leggett & Platt, Inc.*, *supra*, 542 F.2d at 658 (6th Cir.); *United States* v. *Bourque*, 541 F.2d 290, 292-293 (1st Cir. 1976); *United States* v. *Baechler*, 509 F.2d 13, 15 (4th Cir. 1974); *United States* v. *Berrios*, *supra*, (2d Cir.).

[7] The trial court made no contrary finding on this point, since in its view of the law, mere failure to prosecute other similarly situated offenders violates the Equal Protection Clause. See Pet. App. 39a.

[8] Indeed, at least as a matter of federal law, petitioners' conclusory and speculative allegations regarding the prosecutor's bad faith were insufficient to warrant even an evidentiary hearing. See, *e.g.*, *United States* v. *Diggs*, *supra*, 613 F.2d at 1003-1004; *United States* v. *Niemiec*, *supra*, 611 F.2d at 1207; *United States* v. *Torquato*, *supra*, 602 F.2d at 569-572; *United States* v. *Catlett*, *supra*, 584 F.2d at 865-866; *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978). As the Third Circuit recently explained: "In order to minimize the intrusion on the prosecutorial function [and the separation of powers considerations that underlie prosecutorial discretion] * * *, the defendant is obligated to make a threshold showing of discriminatory prosecution before an evidentiary hearing will be accorded on this issue. * * * The defendant bears the burden of * * * [adducing] [s]ome credible evidence * * * indicating that the

1. Petitioners argue (Br. 14, 20-22) that this prosecution was based on the authorities' and the public's adverse reaction to a constitutionally protected political cartoon in the July 1976 issue of *Hustler*. Again, however, the uncontradicted evidence does not support petitioners' factual claims. To be sure, some of the several private complaints made to the authorities about *Hustler* focused on the cartoon in question (A-55 to A-60, A-124 to A-125). But other private complaints, including the anonymous mailing of the entire July issue to the police captain in charge of the pornography unit, related to "the magazine in general" (A-125; see A-55 to A-60, A-124 to A-125). More important, the state's attorney unequivocally testified that following the police investigation into these complaints, he determined to charge petitioners despite and not because of that cartoon (A-59 to A-67). He further explained that he considered that cartoon to be protected speech (A-60; see *Papish* v. *Board of Curators*, 410 U.S. 667 (1973)), but that in his view the magazine as a whole is obscene (A-60-A-81).[9]

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government intentionally and purposefully discriminated * * *." *United States* v. *Torquato, supra*, 602 F.2d at 569-570. In this case, petitioners alleged only that "the present complaints * * * represents [sic] a calculated course of selected, discriminatory and unequal application and interpretation of Ohio law against the defendants, particularly the defendant Larry Flynt, designed to harass and oppress Flynt and the magazine 'Hustler'" (Pet. Consolidated Pretrial Motions and Memorandum, Point VII, at A-1).

[9] Petitioners boldly assert (Br. 20-21) that "[t]he Assistant Law Director had publicly stated that *Hustler's* publishers and editors had been chosen for prosecution as the result of the local citizens' disapproval of the cartoon." Petitioners apparently are referring to a television program in which the

Thus, the evidence adduced at the hearing on the motion to dismiss this prosecution demonstrates only that some of the private complainants may have had misguided or arguably improper motives in contacting the authorities. But, because the Equal Protection Clause solely condemns State action that is invidiously and intentionally discriminatory (see, *e.g.*, *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 166 (1978); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172-177 (1972)), the factors that motivate private persons to call apparently illegal conduct to the attention of the authorities are simply irrelevant to the question whether the prosecution is invidiously or impermissibly motivated. Cf. *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 4. It is inconceivable, for example, that the prosecution of a drug dealer should be dismissed merely because the neighbor who reported the dealer's illicit activities to the police did so for racial or other invidious reasons. In sum, petitioners failed to prove that the prosectuor initiated the charges against them because he sought to suppress their constitutionally protected political cartoon.

2. Petitioners also suggest that the prosecutor "impermissibly made citizen reaction the basis of his prosecution" (Br. 15; see *id.* at 21). It is both inevitable and desirable, however, that citizen com-

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prosecuting attorney was questioned about the *Hustler* prosecution. Petitioners did not introduce a transcript of that program into evidence. Moreover, the prosecutor explained that during the program he had "tried to clarify that [a cartoon complaint] is what started the police officers noticing that magazine; and I did admit 'yes,' somebody had made complaints about this cartoon, but that's not the reason we prosecuted" (A-59).

plaints regarding allegedly illegal conduct ordinarily result in official investigations. Furthermore, in allocating limited prosecutorial resources, it is ordinarily quite proper for a prosecutor to take into account whether the public has generally acquiesced in particular types of technically illegal conduct or whether it considers a particular crime to be especially offensive or harmful. See ABA Project on Standards for Criminal Justice, *The Prosecution Function and The Defense Function* § 3.9(b) (Approved Draft, 1971); Breitel, *supra*, 27 U. Chi. L. Rev. at 431-432. Indeed, as the prosecutor in this case indicated in his testimony before the trial court (A-102 to A-105), since the determination of obscenity vel non turns on "contemporary standards of the community" (*Smith* v. *United States*, 431 U.S. 291, 293 (1977), citing *Miller* v. *California*, 413 U.S. 15 (1973)), consideration of the public reaction to the prurient aspects of petitioners' magazine seems particularly appropriate.

Moreover, where prosecution of all potential offenders is not practical, a prosecutor may properly consider the public notoriety of a particular case in determining whether to prosecute. Enforcement of the criminal law is designed not only to punish, but also to deter. Hence, selection of a more notorious or publicized violation is likely to have a greater deterrent effect, and is thus a rational allocation of prosecutorial resources. *E.g.*, *United States* v. *Catlett*, *supra*, 584 F.2d at 868; *United States* v. *Johnson*, *supra*, 577 F.2d at 1309; *United States* v. *Ojala*, 544 F.2d 940, 944-945 (8th Cir. 1976); *United States* v. *Peskin*, 527 F.2d 71, 85-86 (7th Cir. 1975),

cert. denied, 429 U.S. 818 (1976); *United States* v. *Oaks*, 527 F.2d 937, 940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976). Likewise, since a prosecutor always evaluates the strength of his case in considering a prosecution, the fact that an offender, such as a notorious tax protestor, has publicized and acknowledged the willful nature of his offense is obviously a relevant and permissible consideration for the prosecutor. *E.g.*, *United States* v. *Wilson*, *supra*, slip op. 315; *United States* v. *Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976).[10]

3. Not only did petitioners fail to allege and prove that the prosecutor discriminated against them for invidious reasons, but the evidence affirmatively shows that he exercised his discretion on the basis of wholly appropriate considerations. In addition to the public complaints received regarding *Hustler* generally (see pages 19-21, *supra*), the prosecutor identified two substantial reasons why he selected that magazine rather than others that are arguably similar in content and format. First, the prosecutor stated that he considered *Hustler* to be more offensive than the comparable nationally published magazines of which he was aware (A-89 to A-92).[11] Insofar as

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[10] We further submit that insofar as petitioners did demonstrate that an impermissible factor played a substantial role in the decision to prosecute, the testimony of the prosecutor described below (pages 22-23) shows that this impermissible factor was not the "but for" cause of this prosecution. Accordingly, the Equal Protection Clause does not require dismissal of the charges against petitioner. *See, e.g.*, *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 320-321 n.54; *Mt. Healthy City School District Board of Education* v. *Doyle*, *supra*, 429 U.S. at 285-286; *Washington* v. *Davis*, *supra*, 426 U.S. at 241.

[11] This judgment is supported by the testimony of a police officer who stated that he noticed that only *Hustler* was

petitioners were thus honestly perceived as being engaged in a more flagrant violation of the law than other publishers, the prosecutor properly chose to prosecute them rather than their competitors. See, *e.g.*, *Cook* v. *City of Price*, *supra*, 566 F.2d at 701; *United States* v. *Oaks*, *supra*, 527 F.2d at 939-940; *United States* v. *Scott*, *supra*, 521 F.2d at 1195; Comment, *supra*, 61 Colum. L. Rev. at 1119 n.66. Moreover, since the Equal Protection Clause prohibits only purposeful discrimination, it does not matter that the prosecutor may have been mistaken in his belief regarding the relative offensiveness of *Hustler*, so long as that belief was bona fide. Likewise, it is irrelevant that petitioners can now show that the prosecutor did not bring charges against equally or even more offensive magazines of which he was unaware. *Oyler* v. *Boles*, *supra*; *The Supreme Court, 1961 Term*, 76 Harv. L. Rev. 54, 120-121 (1962).

Furthermore, the prosecutor explained that he focused on charging petitioners because *Hustler* is an Ohio corporation, and its officers and publishers were therefore readily prosecuted (A-109 to A-114). He observed that the obscenity charges were classified as misdemeanors and not felonies, and that, as far as he was aware, he could not seek extradition of out-of-state persons based on misdemeanor charges (*ibid.*). Thus, in deciding to charge the publishers of a nationally published, second-class-mailing-privilege magazine for the first time, the prosecutor reasonably determined that prosecution of an in-state publisher was most feasible.[12] Such a rational, ob-

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largely covered instead of being displayed in full view at the newsstand (A-136). See also *Penthouse Intern., Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

[12] Petitioners did not allege or prove that other well known, nationally published magazines were headquartered in Ohio.

jective basis for prosecuting petitioners fully satisfies the Equal Protection Clause.[13]

CONCLUSION

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted.

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[13] Petitioners also contend (Br. 25-29) that the state appellate courts could not constitutionally reweigh the evidence previously evaluated by the trial court. In *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 9-12, however, this Court held that, consistent with the Due Process Clause, the ultimate fact-finder regarding a pretrial motion in a criminal case need not actually hear the witnesses. Here, moreover, the appellate courts made no factual findings contrary to those made by the trial court. Rather, those courts simply disagreed with the trial court's legal conclusions based on the undisputed evidence at the hearing.

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